Supreme Court, U.S.
FILED
(1)
02 920 DEC 9 2002
OFFICE OF THE CLERK

CASE NO. _____

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 2002

LAWRENCE MOORE,

Petitioner,

v.

LOCAL UNION NO. 58, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; LOCAL 58 ANNUITY FUND; LOCAL 58 PENSION TRUST; LOCAL 58 HEALTH WELFARE TRUST; LOCAL 58 TRAINING TRUST; LABOR-MANAGEMENT CO-OP FUND; LOCAL 58 SUB PAY FUND; LOCAL 58 VACATION PAY FUND; JEFF RADJEWSKI; ELECTRICAL WORKERS JOINT BOARD OF TRUSTEES; THOMAS MITTELBRUN; NATIONAL ELECTRICAL BENEFIT FUND; and NATIONAL ELECTRICAL ANNUITY FUND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence Moore, *Pro Se*
Box 13543
La Jolla, CA 92039-3543
Ph. (858) 452-9537

45 pp

QUESTION PRESENTED FOR REVIEW

1. Can a union take monies from paychecks of a non-member for its "dues" and special purpose funds' "required contributions" in the face of the First and Fifth Amendments to the Constitution, and this Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d (1988), and can a court dismiss a suit based on Plaintiff's allegation he was not a "member" of the Defendant Union (within the meaning of Labor-Management Reporting and Disclosure Act §§ 3(o) and 101) by making a ruling of law that he was a "member" - thereby depriving him of the fact-specific opportunity to show that his employment was as a "non-member," and he did not come within the statutory meaning of the term "member" - in the face of this Court's decision in *Southwest Marine v. Gizoni*, 501 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991)?

LIST OF ALL PARTIES

Petitioner/Appellant/Plaintiff Lawrence Moore, and Respondents/Appellees/Defendants: Local Union 58, International Brotherhood of Electrical Workers; Local 58 Vacation Pay Fund; Local 58 Health Welfare Trust; Local 58 Sub Pay Fund; Local 58 Annuity Fund; Local 58 Pension Trust; Local 58 Health Welfare Trust; Local 58 Training Trust; Labor-Management Coop Fund; Jeff Radjewski; National Electrical Benefit Fund; National Electrical Annuity Fund; Thomas Mittelbrun; and Electrical Workers Joint Board of Trustees.

TABLE OF CONTENTS

page

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

TABLE OF STATUTES 1

STATEMENT OF THE CASE 2

ARGUMENT 5

I. This petition should be granted to review lower court approvals of a union's "takings" from a non-member's wages without notice, due process, or a hearing, and to review the affirmations of such "takings," which have overstepped the boundaries of accepted procedure and departed from the usual course of judicial proceedings, and conflicted with the applicable decisions by this Court (and another circuit court), all of which also require an exercise of this Court's powers of supervision.

CONCLUSION 13

APPENDIX 14

TABLE OF AUTHORITIES

page

Baumgartner v. United States,
322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed.2d 1525 (1944) 11

Brotherhood of Railway, etc. v. Allen,
373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) 9, 11

Beck v. Communications Workers of America,
468 F.Supp. 93 (1979) 7, 9, 11

Beck v. Communications Workers of America,
776 F.2d 1187 (4th Cir. 1985) 7

Beck v. Communications Workers of America,
800 F.2d 1280 (4th Cir. 1986) 7

Bishop v. Wood,
426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 5

Bounds v. Smith,
430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) 12

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) 12

Chambers v. Baltimore & Ohio Railroad,
207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907) 12

Communication Workers of America v. Beck,
487 U.S. 735, 108 S.Ct. 2641,
101 L.Ed.2d 634 (1988) 3, 6-9, 12

Hospital Bldg. Co. v. Trustees of the Rex Hosp.,
425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) 5

In Re Edmond,
934 F.2d 1304 (4th Cir. 1991) 7

International Association of Machinists v. Street,
367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) 8, 11

Kugler v. Helfant,
421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975) 5

NAACP v. Button,
371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) 12

Poller v. Columbia Broadcasting Sys.,
368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) 7

Railway Employees v. Hanson,
351 U.S. 225, 76 S.Ct. 714, 100 L.Ed 1112 (1956) 8

Reed v. United Transp. Union,
488 U.S. 317, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) 10

Southwest Marine v. Gizoni,
502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991) 6

Textile Workers Union v. Lincoln Mills,
353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957) 12

White Motor Co. v. United States,
372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963) 6

Wolff v. McDonnell,
418 U.S. 539, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974) 12

Wooddell v. IBEW Local 71,
502 U.S. 93, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991) 6

CITATIONS TO OPINIONS BELOW

There were no district or circuit court opinions published below in U.S.D.C. No. 01-72222, or Appeal No. 02-1503.

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction over the case was proper in the district court under 28 U.S.C. §§ 1331, 1337 and 1343. The circuit court's jurisdiction to review orders of the district court was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter under 29 U.S.C. § 1254(1) and Supreme Court Rule 10.

TABLE OF STATUTES

Page

United States Constitution, Amendment 1 ..... 2, 4, 7, 9-10

United States Constitution, Amendment 5 ..... 2,4, 9-10

Labor Management Relations Act, § 158(a)(3)
(aka NLRA § 8(a)(3)) (29 U.S.C. § 158) 3, 7-8, 10

Labor Management Relations Act, § 160(b)
(aka NLRA § 10(b)) (29 U.S.C. § 160) 10

Labor-Management Reporting and Disclosure Act, § 3(o),
(29 U.S.C. 402) 6

Labor-Management Reporting and Disclosure Act, § 101,
(29 U.S.C. 411) 6, 10

Railway Labor Act § 2, Eleventh,
(45 U.S.C. § 152) 8

Internal Revenue Code §§ 501, 3121, and 3306 7

Federal Insurance Contribution Act ("FICA") 7

Federal Unemployment Tax Act ("FUTA") 7

STATEMENT OF THE CASE

A complaint was filed June 13, 2001, and the First Amended Complaint was filed, and served on all Defendants on October 9, 2001. The first cause of action for violating the First and Fifth Amendments by "taking" money from a "non-member" Plaintiff's paychecks for Local Union No. 58 ("Union") "dues," and special purpose funds ("Funds") "required-contributions" and refusing to return it or give him an option of paying "agency fees" to Union, was against all the defendants, as were the second, third and fifth causes of action, respectively, for fraud and deceit, breach of contract, and intentional infliction of emotional distress.[1]

The fourth cause of action against Union, and CEO Radjewski was for breaches of their fair representation duties ("DFR").

A prayer for declaratory relief asked for: refund of "takings" and affirmation such "takings" were illegal; stopping the takings; stopping the use of a fine-print "dues deduction authorization" on forms non-members must sign to accept the jobs in the hiring hall Radjewski administers; an order collective bargaining agreement ("CBA") parties (Union and employers) must appoint a neutral-third-party to administer that CBA job referral procedure and hiring hall; and an order declaring the fourth cause of action may instead be presented to the jury as a "breach of contract" claim.

A prayer for injunctive relief also asked to enjoin Union and its Funds: from continuing any conduct declared illegal; from all takings of non-members' wages including dues until it establishes "agency fees" procedures; and to require the Union and its Funds to notify non-members of a right "to be reimbursed for the years of ill-gotten 'takings.'" Plaintiff also prayed for special damages, punitive damages and such further relief deemed just and proper.

Union and Radjewski filed their Answer on October 29, 2001, and Plaintiff served interrogatories and requests for production of documents on them on December 3, 2001.

Funds Defendants, including their "administrator" Mittelbrun,

---

[1] Plaintiff also alleged the "takings" included "kickbacks" to employers (in amounts equal to Funds takings) from overtime pay for doing initial deductions from his paychecks and for sending it to Defendants. Exact amounts of wages taken are unknown because Union will not let a non-member see its CBA, and the court would not permit "discovery."

filed and served a "Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment" October 29, 2001 supported by Mittelbrun's Affidavit and exhibits. Plaintiff responded on November 26, 2001, and included an Affidavit and separate F.R.Civ.P. 56(f) Affidavit. A Funds' December 4, 2001 reply was supported only by another Mittelbrun Affidavit.

Union and Radjewski then filed a "Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint" November 19, 2001, supported by Radjewski's "declaration." The Plaintiff's December 14, 2001 response included another F.R.Civ.P. 56(f) Affidavit showing outstanding discovery requests, and Union Defendants filed a late, unsupported Reply.

Union then wrote Plaintiff for an extension of time to January 18, 2002 to answer his discovery - which he agreed to - but then also moved for a "protective order" against all discovery (despite filing their Answer, and a Motion for Summary Judgment).

The court then held a telephone status conference and filed its January 7, 2002 Order altering the agreement and allowing Union to avoid discovery. Funds then wrote that judge for dismissal "to expedite...a decision, that might help to minimize the continuing costs to defendants ...." Please see Appendix "Apx" at 20, 21.

Dismissal, and summary judgment was granted to Defendants March 18, 2002 (Apx 22-36) *via* a "Background" and "Analysis" finding: Plaintiff's "position is directly contrary to the purpose of [NLRA § (8)(a)(3)] as explained by the *Beck* Court" (Apx 33); his Constitutional claims "are factually and legally without merit" (Apx 34); and Union Defendants are "private parties" (34-35), to conclude that, "the limitation that § 8(a)(3) places on the use of nonmember dues is simply not implicated here" (Apx 32-35).[2]

The court's attack was for his "insist[ing] ... Local 58 had 'no

[2] That Order is reproduced *without typos*, all the Plaintiff's affidavits showed Defendants' "political" and "organizing" (like *Beck*) spendings, but the Order also mis-stated he tried to "avoid the negotiated overtime arrangements"; his claim "dues" were used for "political or other non-core activities" is "unsubstantiated"; Funds' "takings" from wages are employers' "contributions"; and "union dues" claims are unsustainable.

right' to deduct dues from his wages or other nonmembers of the Local 58" (Apx 33) but insisted he acted "out of retaliation" (35).

That lower court also argued allegations in the First Amended Complaint "that an unknown amount of benefits were taken from him [are] directly contrary to the explanation that Radjewski gave to him," and his 1998 "benefits would have been sent to [a] home fund if he had timely submitted the reciprocity form."[3]

Plaintiff moved to vacate the Judgment (providing an affidavit and evidence of National Electrical Benefit Fund's multi-millions in political-spendings), but was summarily rejected (Apx 37).

On appeal Judgment was affirmed in a *Not Recommended For Full-Text Publication* Order filed September 13, 2002 (mis-stating the case is also filed "pursuant to" ERISA), summed up claims, and rejected judicial bias (below) arguments to conclude,

> "Moore's complaint lacked merit. Moore's first claim, in which he asserts that the defendants violated his constitutional rights, is not actionable. Generally, 'the conduct of private parties lies beyond the Constitution's scope ....'"

Apx 39.

The court acknowledged Plaintiff "was not a member of Local 58," referred to a *public* hiring hall created to administer a CBA job Referral Procedure as "Local 58's hiring hall" and found that his "main complaint is that Local 58 supposedly tricked him into signing the dues deduction authorization," and his other "primary allegations" are the Union denied him "a voice as a non-member" and the CBA didn't permit deductions from non-members' wages for "dues" used for political contributions (ignoring "organizing" and Plaintiff's other objections). The court held a "fourth" claim for breach of the duty of fair representation preempted all "state law claims," and all claims were "time-barred." (Apx 38-40).

---

[3] In 1998 General Motors locked everyone out prior to a strike and the Plaintiff was offered an alternate job by his employer until the lock-out ended but Radjewski refused to let non-members be transferred, instead promising them preference in re-hiring after that lock-out, but reneged, forcing Plaintiff to move on before he completed a "reciprocity" form.

ARGUMENT

I. This petition should be granted to review lower court approvals of a union's "takings" from a non-member's wages without notice, due process, or jurisdiction, and to review the affirmations of such "takings," which have overstepped the boundaries of accepted procedure and departed from the usual course of judicial proceedings, and conflicted with the applicable decisions by this Court, and another circuit court, all of which also require the exercise of this Court's powers of supervision.

The lower court erred by dismissing "non-member" Plaintiff's suit after all Defendants' F.R.Civ.P. 12(b)(6) motions to dismiss, where the court refused to accept any allegations in the complaint as true, and instead argued with every law-related allegation. *See Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Kugler v. Helfant*, 421 U.S. 117, 125 n.5, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975).

The court erred by granting all Defendants summary judgment where Plaintiff's opposing legal memoranda were supported both by affidavits with exhibits that validated his complaint allegations and F.R.Civ.P. 56(f) affidavits showing Plaintiff diligently served interrogatories and request for production of documents on Union Defendants who answered the complaint, showing the information needed, how it would prevent summary judgment, and why it had not been obtained. Funds did not answer the complaint.

But Plaintiff's papers were carefully scrutinized, rather than Defendants', and disputed matters were resolved in favor of the Defendants, rather than accept the non-movant's version. *But see Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (non-movant's version of the facts must be accepted).[4]

[4] Plaintiff showed: his 1998 layoff was because he wasn't a "member"; overtime and Funds' takings were from wages; the true "dues deduction authorization" on job referral cards; a first "demand" letter was sent Dec. 12, 2000, and an "agency fees" offer later; and timely, relevant exhibits of Defendant's "political spendings" (but see Apx 17, 22-34).

Although the documents Plaintiff produced, despite the court's effort to preclude discovery, were sufficient to justify opposition, and although responses to the discovery requests would overcome even its "partiality" to Defendants, the Order dismissing the case and granting summary judgment was grounded in refusal to apply the decision of this Court in *Communication Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) to this case, and was a ruling of law equating "membership" in a separate Int'l B'hood of Elect. Wkrs. with "membership" in the Defendant Local Union No. 58. The court's ruling of law was,

> "Plaintiff stands in much different shoes than the Plaintiffs in *Beck*. Unlike the *Beck* plaintiffs, Plaintiff is an IBEW member. [] Plaintiff is not being forced to pay dues by virtue of § 8(a)(3). Plaintiff elected to become a member of the IBEW. Accordingly, the limitation that § 8(a)(3) places on the use of nonmember dues is simply not implicated here."

Apx 32-33. All Union's takings were based on Plaintiff's wages earned as a "Bargaining Unit" worker. Determination of whether he was a "member" of Defendant Local Union No. 58 within the meaning of LMRDA §§ 3(o) and 101 is necessarily fact-specific, and by ruling on a motion for summary judgment that Plaintiff was a "member" as a matter of law, the district court deprived Plaintiff of the opportunity to show that his "employment" did not come within the meaning of that term. *See Southwest Marine v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991) (determination whether plaintiff was a "seaman" was fact-specific, and by ruling he was not a "seaman" as a matter of law deprived him of opportunity to show his employment came within the statutory meaning of that term). *See also Wooddell v. IBEW Local 71*, 502 U.S. 93, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991) (IBEW constitution is a contract between two separate unions).

Access to proof must be seriously considered when granting summary judgment where, as here, the crucial facts are within the control of moving Defendants. *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963);

Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). *See In Re Edmond*, 934 F.2d 1304 (4th Cir. 1991) (Defendant may not offer affidavit selectively supporting his version of the facts while simultaneously using the Fifth Amendment privilege to forestall discovery).

Plaintiff knows Union Funds' "takings" are amounts deferred from all bargaining unit workers' gross CBA wages only by votes of Union members in closed-to-non-members meetings, but that no such monies may be taken until the Internal Revenue Service approves the Union Funds as "Voluntary Employees' Beneficiary Associations" ("VEBAs"), as per Internal Revenue Code §§ 501, excluding the "deferred" amounts from all workers' gross income (IRS Code §§ 3121 and 3306 exclude similarly deferred monies under the Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA), respectively).

Union may take "agency fees" from nonmember for collective bargaining purposes but other takings implicate First Amendment rights of workers who object. *Beck v. Communications Workers of America*, 468 F.Supp. 93 (1979), *aff'd*, 776 F.2d 1187 (4th Cir. 1985); *aff'd en banc* 800 F.2d 1280 (1986); *Communication Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), holding it "was not precluded from deciding the merits" of NLRA § 8(a)(3) claims as a "DFR" challenge.

> Respondents ... claim that the union failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs. The necessity of deciding the scope of § 8(a)(3) arises because *petitioners* seek to defend themselves on the ground that the statute authorizes precisely this type of agreement. Under these circumstances, the Court of Appeals had jurisdiction to decide the § 8(a)(3) question raised by respondents' duty-of-fair-representation claim. (Citations omitted.)

C.W.A. v. Beck, 108 S.Ct. 2647-48.

The Court also decided "takings" from non-members, whether called "assessments," "dues," or for Union special purpose funds (e.g., a credit union or building fund) cannot be "taken" because:

> "obviously, once...determined that the dues were not for collective bargaining purposes [or] 'for the maintenance of the [union] as an organization [the Funds] could be terminated without affecting the continued existence of [the union] as the bargaining representative.'"

Id., 108 S.Ct., at 2652-53, n.7. The Court decided a DFR exists in Constitutional claims litigated instead under § 8(a)(3) because federal courts have "jurisdiction" over union-exactions-of-money-from-nonmembers claims as "governmentally compelled fees." *Id.*, 2655-57, *citing Railway Employees v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed 1112 (1956) (R.L.A. preemption of state laws banning union security agreements involves governmental action); *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (R.L.A. § 2, Eleventh limits union exactions from non-members to collective bargaining activities).

The Court held § 8(a)(3), like § 2, Eleventh authorizes only exaction of the fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Communications Workers of America v. Beck*, 108 S.Ct. 2641, 2657 (1988).

The Supreme Court thus reinforced its pragmatic decision to avoid Constitutional decisions where a different option pursuant to statutory constructions was possible,

> Accordingly, in *Street* we interpreted § 2, Eleventh to avoid the serious constitutional questions that would otherwise be raised by a construction permitting unions to expend **governmentally compelled fees** on political causes that nonmembers find objectionable...., and we therefore need not strain to avoid the plain meaning of § 8(a)(3) as we did with § 2, Eleventh. (Citations omitted.) (Emphasis added.)

C.W.A. v. Beck, 487 U.S., at 761. 108 S.Ct., at 2656-57.

Further, the Supreme Court also held,

> "The courts below, of course, possessed jurisdiction over respondents' constitutional challenges. Whether or not the NLRB entertains constitutional claims, such claims would not fall within the Board's primary jurisdiction." (Citations omitted.)

C.W.A v. Beck, 108 S.Ct. 2641, 2648 n.1. Clearly, unions that are "certified" by a federal government administrative agency as the government's "exclusive representative" of all the employees in a "bargaining unit" are "state actors" in that capacity, and this Court affirmed the district court's decision below related to the timeliness of the *Beck* plaintiffs' complaint, which decided,

> Respondents first made known their objections to the petitioner's political expenditures in their complaint filed in this action; however, this was early enough.

Beck v. Communications Workers of America, 468 F.Supp. 93 (D.C.Md. 1979), *citing Brotherhood of Railway, etc. v. Allen*, 373 U.S. 113, 119 n.6, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), and rejecting the union defendants' requests that the *Beck* plaintiffs be required to invoke and exhaust the union's grievance procedure. *Id.*, 468 F.Supp., at 95.

A district court instead embraced Union's fraud that Plaintiff's October 15, 2000 letter (mis-dated September 15, 2000) trying to rescind that fine-print "dues deduction authorization" on Union's job referral acceptance form was instead a "demand" letter that made his initial June 13, 2001 filing time-barred (Apx 36).

The circuit court held he "should have known of the union's alleged breach of the duty of fair representation ... well before he completed the second job during the week ending November 4, 2000" (ignoring this Court's *Beck* choices) and applied the same time-barred "six-months statute of limitations" (Apx 39-40).

However, the first of Plaintiff's letters that could be construed as a "demand" letter was mailed December 12, 2002 (Apx 17).

Those lower courts also erred by ruling the instant breach of duty of fair representation claim is barred by the LMRA § 160(b) 6-month limitation period, where Constitutional claims are being litigated instead under LMRA § 158(a)(3) (NLRA 8(a)(3)).

Because the underlying Constitutional claims may be resolved *via* that "judicially implied" duty of fair representation, and none of the criteria usually present to accommodate federal interests in stable bargaining relationships between employers and unions, or in private dispute resolution under CBAs (which normally call for the 6-months statute of limitations) there can be no good reason for imposing it here.

The Supreme Court has declined to impose that N.L.R.A. § 10(b) 6-months limitation period on analogous grounds, stating,

> Because [LMRDA] § 101(a)(2) is modeled on the First Amendment, it is readily analogized to state personal injury actions.... It was held that suits under 42 U.S.C. § 1983, which also protects the exercise of First Amendment rights, are governed by state general or residual personal injury statutes of limitations. (Cite omitted.)

Reed v. United Transp. Union, 488 U.S. 317, 319-320, 109 S.Ct. 621, 623, 102 L.Ed.2d 665 (1989), further stating,

> The 6-month § 10(b) statute of limitations was crafted to accommodate federal interests in stable bargaining relationships between employers and unions and in private dispute resolution under collective-bargaining agreements. Insofar as those interests are implicated ..., however, the relationship will be tangential or remote - as in the present case, which involves an internal union dispute that can have only an indirect impact on economic relations between union and employer and on labor peace.

Reed v. United Transp. Union, 109 S.Ct. 621, 623 (1989).

The district court depended on the historical fact of when

Plaintiff first "attempted to rescind his dues authorization," and the circuit court used when "he first knew or should have known." Those two courts' arguments over historical facts, whittled down to a meaning understood in light of prevailing law, is that Plaintiff did not object to Union's "takings" for those purposes set out in *International Association of Machinists v. Street*, 367 U.S. 740, 774, 81 S.Ct. 1784, 1803, 6 L.Ed.2d 1141 (1961) early enough. Disputes over whether a thing was done (or an event occurred) may be called *historical* facts, and are issues for the jury. *See Baumgartner v. United States*, 322 U.S. 665, 671, 64 S.Ct. 1240, 1243, 88 L.Ed.2d 1525 (1944).

None of those issues are present here, where this Plaintiff's Complaint set out, for the first time, his "objections" that Union was using monies wrongfully taken from his wages for "political" and other prohibited purposes. *See Beck v. C.W.A.*, 468 F.Supp. 93, at 95 (D.C. Maryland 1979). As that court held,

> Thus, it is clear that the law does not require an affirmative demonstration of protest as a condition precedent to bringing suit. All that is required is that the individual dissenter make known his position so that, in fairness to the union, no one who does *not* object to the union's political expenditures is able to secure relief.

Id., at 95, *citing International Association of Machinists v. Street, supra*, and *Brotherhood of Railway, etc. v. Allen*, 373 U.S. 113, 119 n.6, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), holding,

> Respondents first made known their objection to the petitioner's political expenditures in their complaint filed in this action; however, this was early enough.

Beck v. C.W.A., at 95.

Plaintiff's affidavits in support of oppositions to Defendants' motions to dismiss, and for summary judgment also showed their willingness to use physical force to enforce such takings, and that assaults and batteries by "goon squads" in Detroit, and its "sister

union" in Toledo, Ohio forced Plaintiff to relocate his family in the 1980s (he has similarly sued that Ohio union for its "takings" and for stealing money "reciprocated" to it from the instant union and others after a trusted administrator of Toledo funds retired).[5] The right of access to the federal courts is basic to our system of government, and it is well established that it is a fundamental right protected by the Constitution. As this Court has decided,

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (prisoners have more right of access to courts than collective bargaining workers).

There is no doubt that union's "takings" from the Plaintiff's

---

[5] The district court's Order dismissing Plaintiff's suit to recover his property was inherently tribalistic, rather than rational, and was clearly meant to further political and economic agendas. It is very difficult to understand why working peoples' Constitutional rights to their property are compromised in pursuit of a separate body-of-labor-law, for unions and employers willing to bargain "collectively" with unions, pursuant to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). *Beck* dissenters probably wouldn't feel the same if a foreign Bar Association stole one third of their salaries for a *pro hac vice* appearance.

wages constitute "outright seizure" of his property without notice, a hearing or due process because he isn't a member of the Union with a right to debate and vote on motions to defer part of wages members earn as "bargaining unit" workers into Union Funds, or to vote on Bylaws dues also approved only in Union's meetings.

CONCLUSION

Of course, the problems could be resolved by offering all non-members "membership" equally, as per the CBA's union security clause, or by such unions settling for the "agency fees" they are now entitled to by law, rather than abusing their administrations of CBA job referral procedures to extort and intimidate such non-members out of their wages, but Socrates drank hemlock, Galileo recanted, Hobbes' theories have not been successfully refuted, and Darwin has been wrongly blamed for fascism, indicating that it may be perspicacious, at least contemporaneously, to rely on a social contract created by the framers of the Constitution rather than the ethical priorities of union officers, politicians, or judges.

The district court erred by not accepting the allegations of the First Amended Complaint as true, and instead dismissing that suit under Fed.R. Civ.P. 12(b)(6), and erred by holding as a matter of law that Plaintiff was a "member" of Defendant Union, where such a determination is necessarily fact-specific, especially since the Union's right to deduct both dues, and monies for its "special purpose funds" from bargaining unit workers' paychecks depends on the statutory meaning of that term. Plaintiff owed Union only "agency fees" that may not be "taken" without his permission.

Plaintiff diligently served discovery requests on Union and its CEO Radjewski (the self-appointed Funds trustee and manager of the employers job referral procedure) but they were excused from answering by that January 7, 2002 district court status conference Order, indicating "summary judgment" was premature. Plaintiff did not sue Radjewski for depriving him of his job in 1998, and tried to effect a compromise on Union's takings, but overweening Radjewski insisted on taking it all because other unions affiliated with the IBEW do so, and insisted that Plaintiff had no choice.

Dated: 12-06-2002 Lawrence Moore

Lawrence Moore

APPENDIX

page

Labor Management Relations Act, § 158(a)(3)
(29 U.S.C. § 158) 15

Labor-Management Reporting and Disclosure Act,
§ 2 (29 U.S.C. 401) 16

Labor-Management Reporting and Disclosure Act,
§ 3(o) (29 U.S.C. 402) 16

Labor-Management Reporting and Disclosure Act,
§ 101(a)(1) (29 U.S.C. 411) 16

Plaintiff's "demand" letter dated DEC 12, 2000 17

Order Setting Date for Status Conference, etc.
filed NOV 29, 2001 18

Plaintiff's letter extending discovery deadline two weeks,
dated JAN 2, 2002 19

Order extending discovery deadline until case is dismissed,
filed JAN 7, 2002 20

Defendants' Letter asking judge to dismiss case,
dated FEB 19, 2002 21

Order dismissing case,
filed MAR 18, 2002 22

Judgment filed MAR 18, 2002 37

Order denying request to allow reconsideration motion,
filed APR 11, 2002 37

Order Denying Appeal,
filed SEP 13, 2002 38

Labor Management Relations Act

Unfair Labor Practices

Sec. 158(a)(3). (29 U.S.C. § 158) It shall be an unfair labor practice for an employer - by discrimination in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreeement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Labor-Management Reporting and Disclosure Act

Declarations of Findings, Purposes, and Policy:

Sec. 2(b). (29 U.S.C. 401) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplemental legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce ....

Definitions: Sec. 3(o). (29 U.S.C. 402)

For the purposes of titles I, II, III, IV, V (except § 505), and VI of this Act - "Member" or "member in good standing" when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership ....

Title I - Bill of Rights of Members (29 U.S.C. 411):

Sec. 101(a)(1). Every member of a labor organization shall have equal rights and privileges within such organization to nominate cnadidates, to vote in elections ..., to attend membership meetings and to participate in the deliberations and voting ... subject to reasonable rules and regulations ....

December 12, 2000
Jeff Radjewski, Business Manager IBEW Local 58
1358 Abbott Street
Detroit, MI 48226-2460

Dear Sir:

I wrote to you on October 15, 2000 rescinding a "Payroll Deduction Authorization" you had me sign when I accepted a job with Triangle Electric Inc. on 9-15-00 (I also asked you to inform that employer) and requested names of all Sub-pay Fund trustees and administrators and all documents describing the legal makeup and operation of that entity, including all of the bases for participation, qualification and for receiving benefits. I also referred to my October 5, 2000 letter to an administrator of all Local 58's "Trusts," "Funds," and "Committees" funded by deductions from gross wages I earned when I worked under your collective bargaining agreement (enclosing a copy of that letter to your administrator). You did not reply.

Triangle Electric continued to deduct 3% of my gross wages. Please refund all "Union Working Dues" deducted from paychecks by Triangle Electric, and by Hall Engineering. I am not a member of Local 58.

Please consider this to be a request for your direct re-payment to me of any and all monies deducted from my wages to fund any of the joint trusts and/or committees identified in collective bargaining agreement(s), Bylaws, and constitutions, which Local 58 is a party to (including that Sub-pay fund), and also want all my monies which you have sent to Washington, D.C. based International Brotherhood of Electrical Workers refunded, including specifically, deductions for a Labor-Management Coop Committee(s) (including all the monies deducted from my wages when I worked for Hall Engineering in 1998).

Thank you for your cooperation.

Sincerely,
Lawrence Moore

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CASE NO. 01-72222

Order Setting Date For Status Conference And Response To Motion For Dismissal For Failure To State A Claim On Which Relief Can Be Granted, Or In The Alternative Summary Judgment On Counts I-V Of Plaintiff's Complaint, Filed November 19, 2001

IT IS ORDERED that plaintiff file a response to Defendants' IBEW Local 58 and Jeffrey Radjewski's Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint, filed November 19, 2001, by Friday, December 14, 2001.

IT IS FURTHER ORDERED that a Status Conference will be held by telephone on Friday, Janaury 4, 2002 at 11:00 a.m. The Court will initiate the conference call.

IT IS SO ORDERED.

Filed: NOV 29, 2001

Victoria A. Roberts
U.S. District Judge

January 2, 2002
To: Duane F. Ice
Martens, Ice, Glass, etc.
17117 West Nine Mile Road, # 1400
Southfield, MI 48075
Ph. (248) 559-2110

Re: Moore v. IBEW Local 58, U.S.D.C. Case No. 01-72222.

Dear Sir:

Your letter dated December 28, 2001 requesting agreement to extend the time period for responses to my First Set(s) Of Interrogatories and First Request(s) For Production of Documents to Defendants Jeff Radjewski and Local Union 58 until January 18, 2002 on grounds this case may be dismissed on January 4, 2002 has been received. All of the responses to discovery requests are due on January 5, 2002. It seems that you decided to dedicate Local 58's resources to requests for "protective" orders (complete with *ad hominem* attacks you first began in your motions to dismiss) rather than answers and responses to the discovery requests. I note for the record that your letter, and your motion for protective order emanated from your offices on the same date.

In the future I will not agree to any such extensions of time based on personal attacks, however, other than the caveat of any contrary ruling by the presiding judge on January 4, 2002 I will tentatively agree to your current request for extension of time to January 18, 2002. Please send a proposed stipulation in the future.

The agreement to extend time was telephoned to Ms. Debra Krell of your office this morning, after I was informed that you were "with a client," and John Adams was not available.

Thank you for your cooperation.

Sincerely,
Lawrence Moore

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CASE NO. 01-72222

Order

Defendants The International Brotherhood of Electrical Workers, Local 58 ("Local 58") and Jeffrey Radjewski filed a Motion For Protective Order (Doc #24). Based on a telephone conference held on January 4, 2002 and attended by Lawrence Moore representing himself, Patricia Fabrizio representing the IBEW Local 58 Funds and Thomas Mittelbrun, and John Adams representing Local 58 and Jeffrey Radjewski, this motion is deemed WITHDRAWN. Mr. Moore agrees that discovery should be held in abeyance pending the outcome of dispositive motions which are pending.

IT IS SO ORDERED.

Filed: JAN 7, 2002

Victoria A. Roberts
U.S. District Judge

February 19, 2002
Sachs Waldman
1000 Farmer Street
Detroit, MI 48226-2899
Ph. (313) 965-3464

Hon. Victoria Roberts
United States District Court
231 W. Lafayette Boulevard
Detroit, MI 48226

Re: Lawrence Moore v. IBEW Local 58, Case No. 01-72222

Your Honor:

On behalf of these Defendants, we filed a Motion For Dismissal For Failure to State a Claim on Which Relief Can Be Granted, or in the Alteranative, Summary Judgment on October 29, 2001. The hearing was held January 4, 2002 on this Motion and on the Motion of the other defendants for summary judgment. Your Honor indicated at that hearing (held telephonically) that a decision would be promptly rendered.

Since that time, plaintiff has filed a motion to transfer this and two unrelated matters to the Multidistrict Litigation Panel, to which defendants have responded at considerable cost. That motion has now been scheduled for hearing in Tucson, Arizona on March 21, 2002, which will involve additional considerable costs.

I write to inquire as to the status of the Motions pending before the Court and to respectfully request that your Honor, if possible, expedite the rendering of a decision, which might help to minimize the continuing costs to defendants in defending what is undoubtably a meritless and frivolous action.

Sincerely,
Patricia J. Fabrizio

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CASE NO. 01-72222

Order Granting Dismissal and Summary Judgment In Favor of Defendants.

I. Introduction

On June 13, 2001 Plaintiff filed his lawsuit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds ("the Funds").[1] The Funds and Mittelbrun filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment on October 29, 2001, and the Local 58 and Radjewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint on November 19, 2001. For the reasons that follow, the Court will grant the Motions.

II. Background

During the relevant time period, Plaintiff was a member of the International Brotherhood of Electrical Workers ("IBEW")

---

[1] According to Defendants the proper legal names for the Funds are IBEW Local 58 Annuity Fund, Electrical Workers' Pension Trust Fund of Local Union # 58, I.B.E.W., Detroit, Michigan; Electrical Workers Insurance Fund; Apprentice and Journeyman Training Trust of the Electrical Industry, Detroit, Michigan; Southeastern Michigan Electrical Industry Labor Management Cooperation Trust Fund; Supplemental Unemployment Benefit Plan of the Electrical Industry, Detroit, Michigan; Electrical Workers Joint Board of Trustees Vacation Fund.

The Funds further state that there is no legal entity known as the Electrical Workers' Joint Board of Trustees. Rather, that term is used to collectively describe the fringe benefit funds established by Local 58's collective bargaining agreement, the International Brotherhood of Electrical Workers, and the Southeastern Michigan Chapter of the National Electrical Contractors Association.

Local No. 8 in Rossford, Ohio (*Local 58 Br.* at Ex A). Perhaps because of that membership, he was able to obtain "job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ('CBA') between Defendant LOCAL 58 and Detroit area electrical contractors" (*Complaint* at ¶ 3). Like Local 8, "LOCAL 58 ... is affiliated with Intern'l B'hood of Elect. Wkrs ...." (*Complaint* at ¶ 4).

Perhaps because of Local 58's affiliation with IBEW, Plaintiff was allowed to sign a Pension Reciprocity form that would allow contributions made to the benefit funds on Plaintiff's behalf to be sent to his Local 8 funds. (See *Local 58 Br.* at Ex A). But, when Plaintiff worked under Local 58's jurisdiction in July 1998, he did not complete the reciprocity form. He did not realize this error until 2000. On July 14, 2000 Plaintiff wrote a letter to the business manager of Local 58 explaining that he had previously "forgotten to come back and fill out reciprocity forms," and asking that the contributions now be sent to the Local 8 funds. (*Id.*) That request was denied by the Board of Trustees of the Electrical Workers' Pension Trust Fund. Thomas Mittelbrun III, the administrator of the fund, explained in a September 13, 2000 letter to Plaintiff that his "request was denied due to it being made outside the time limit of one year allowed by the Plan." (*Local 58* Br. at B).

Two days later, on September 15, 2002 Plaintiff received a referral from Local 58 to performance work for Triangle Electric Company. At the bottom of the relevant referral card there is a section that states in bold and relatively large type, "PAYROLL DEDUCTION AUTHORIZATION." Underneath the card states:

> I authorize the above Employer to deduct from my paycheck, the Union Working Dues, as stated and required in the amount fixed in the Bylaws of the Local Union 58, IBEW, and remit same to said Local Union in accordance with the terms set forth in the Bargaining Agreement between the NECA Chapter Southeastern Michigan and Local Union 58, IBEW.

(*Local 58 Br.* at Ex. C). Plaintiff signed the referral card on the

line directly below that paragraph. (*Id.*)

It appears likely that Plaintiff signed the referral card before he received the September 13 denial letter from Middleton because, in a letter dated September 16, 2000 he angrily attempted to rescind the payroll deduction authorization. (*Local 58 Br.* at Ex. D). That September 15 letter was sent to Jeff Radjewski, the Local 58's business manager. Plaintiff began the letter by accusing Radjewski of "illegally screwing" him out of his job in July 1998 when he was laid off. (*Id.*) He continued the letter by stating that, in response to his request to have his 1998 pension fund "deductions"[2] sent to his home funds, Radjewski "blew [him] off with an abusive, intrusive letter from your Pension Trust administrator who attached a pretentious suffix to this name ...." (Id.) Plaintiff stated to Radjewski:

> I have no idea why you are so chicken-hit in stealing my 80 Pension credit-hour deductions ..., but whatever caused it is also causing my following reactions.
>
> I am hereby rescinding that "dues check-off authorization" I signed when I accepted a job-offer from Triangle Electric Co. on 9/15/00. Please inform my employer immediately and please also send me names of all "Sub-pay" Fund trustees and administrators and all documents describing the legal make-up and operation of that entity ....

(*Id.*)

What is important to note from the above letter is that Plaintiff did not indicate to Radjewski that he mistakenly or unknowingly signed the dues deduction authorization. He does not state that he was tricked. Rather, he stated that he wanted to rescind that authorization in response to the decision to deny his

---

[2] As will be explained *infra.*, Radjewski maintained that there were no pension *deductions* from Plaintiff's paycheck. Rather, the employer had made pension *contributions* over and above Plaintiff's pay.

request to have his 1998 pension benefits transferred to his home fund.

A more friendly letter dated September 15, 2000 was sent from Plaintiff to Frank Demers of Local 58. (*Local 58 Br.* at Ex. E). He explained that his recent review of his records revealed that he had forgotten to fill out and return a reciprocity form for the 80 hours he worked under Local 58's jurisdiction in 1998. Plaintiff asked Demers for help. (*Id.*)

On December 12, 2000 Plaintiff wrote another letter to Radjewski complaining that Radjewski had never responded to his earlier letter and that the dues were still being deducted from his wages. Plaintiff asked Radjewski to refund all the dues that had been deducted. (*Local 58 Br.* at Ex. F).

Radjewski responded on January 2, 2001, acknowledging that he had not responded to Plaintiff's earlier letter. He reasoned, "If you want a civil reply write a civil letter." (*Local 58 Br.* at G). Radjewski further stated that Plaintiff would need to notify his employer if he wanted to cancel his payroll deduction authorization. He informed Plaintiff that Local 58 could not start or terminate a payroll deduction on its own. Moreover, Radjewski stated, since Plaintiff was a member of the IBEW he was not entitled to a refund of all dues and benefit fund contributions. "On the contrary, you are required to meet all member obligations, includes those obligations imposed by Local 58's collective bargaining agreement with its employers under which you worked and got paid." (*Id.*) In the interest of the entire IBEW membership, it was Radjewski's duty to uphold the obligations imposed by the Local 58 collective bargaining agreement "under which you worked and got paid." (*Id.*) Radjewski additionally explained, "Benefit contributions are not deductions from your wages. They are separate obligations, in addition to wages, that the employers must meet pursuant to the collective bargaining agreement." (*Id.*)

In response to Radjewski's January 2 letter Plaintiff for the first time accused the managers of the hiring hall of tricking him into signing the payroll deduction authorization. (*Local 58 Br.* at H). In his January 19, 2001 letter Plaintiff stated that his membership with the IBEW was unrelated to the Local 58's request to take money from his wages and that he had no

obligation to pay the dues, and accused Local 58 of having engaged in theft. (*Id.*) Plaintiff demanded that all deductions from his 1998 and 2000 wages be returned to him. (*Id.*)

Radjewski wrote back to Plaintiff on March 5, 2001 and denied that Plaintiff had been tricked. (*Local 58 Br.* at I). The referral card had the authorization on it in plain sight and Plaintiff signed it. Further, "[p]aying working dues is a member's obligation and, as I understand it, you are still an IBEW member with Card No. D295652." And, the benefit contributions that were paid by the employer were owed pursuant to the collective bargaining agreement - the same collective bargaining agreement that entitled Plaintiff to wages from his employer. (*Id.*) Moreover, Radjewski explained:

> Our arrangement on these issues are the same as other locals around the country. You and all IBEW members receive the advantages of these arrangements. As I told you previously, I am required to uphold the IBEW constitution and our collective bargaining agreement. These monies are not "stolen by minority votes at union meetings" as you claim.
>
> Even if there were to be a refund of benefit contributions, any such refund would go back to the employer who paid them, not you. The reason is that benefit contributions are not deductions or "theft," as you call it, from your gross wages. The wages are entirely separate from the benefit contributions paid by employers.

(*Id.*)

Plaintiff's April 5, 2001 letter revealed that he was undeterred. He continued to seek the 80 credit-hours of pension contributions that he insisted were stolen from his paycheck. And, he continued to insist that he owed no dues to the Local 58 because he was not a member of that organization. The deduction of dues was according to Plaintiff taxation without representation because he had no voice or vote in Local 58. (*Local 58 Br.* at Ex. K).

This lawsuit followed. As described below the Court finds that Plaintiff's allegations either fail to state a claim or are not supportable by the evidence.

III. ANALYSIS

A. Standards of Review

Defendants' Motion is partially filed pursuant to Fed.R.Civ.P 12(b)(6). When reviewing a Rule 12)b)(6) Motion the trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Rule 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of the witnesses." *Miller*, 50 F.3d at 377. The court should deny a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Gazette*, 41 F.3d at 1064; *see also Miller*, 50 F.3d at 377; *Vemco, Inc. v. Camardela*, 23 F.3d 129, 132 (6th Cir. 1994). While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1249 (6th Cir. 1993). Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240.

Defendants also rely upon Fed.R.Civ.P. 56(c). Under Rule 56(c) summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties."

Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir. 1995). To meet this burden the movant may rely on any of the evidentiary sources listed in Rule 56(c). *Cox*, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). Thus, a motion for summary judgment is a means by which to challenge the opposing party to "put up or shut up." *Cox*, 53 F.3d at 149; *Street*, 886 F.2d at 1478. The moving party does not, however, have to support its motion for summary judgment with evidence negating its opponents claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

Once the moving party has met its burden, the burden shifts to the nonmoving party to produce evidence of a genuine issue of material fact. Rule 56(e); *Cox*, 53 F.3d at 150. The nonmoving party cannot rest on its pleadings, but must present significant evidence in support of its complaint. *Copeland*, 57 F.3d at 479. The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the non-moving party. *Snyder*, 57 F.3d at 488; *Tolton*, 48 F.3d at 941.

B. Count I

Plaintiff's first count alleges, against all Defendants, a violation of his First Amendment Rights of Free Speech and Association and a Fifth Amendment taking without due process. This Count includes a litany of allegations, including that the Local 58 refuses to allow non-members any voice or vote on the

collective bargaining agreement; has no right to deduct dues from non-members under the CBA; and requires electricians who accept jobs at the hiring hall to sign a job acceptance form which includes a payroll deduction authorization in fine print. Plaintiff contends that he was not told that the payroll deduction authorization was on the job acceptance form, but that Local 58 nonetheless took three percent of his wages; that Plaintiff was given no vote on participating in the Funds, but that Defendants took monies from Plaintiff for nonexistent, unavailable benefits; that Defendants also took monies from Plaintiff by agreeing that he receive reduced rates of pay for overtime work; and that the Local 58 refused to honor Plaintiff's rescission of his dues deduction authorization. Further, Plaintiff alleged:

> 37. At least some of the monies deducted from the PLAINTIFF's wages by Defendants TRUST and FUNDS are expended for political or for lobbying activities not directly related to work conditions, or community services, union organizing, foreign affairs, publicity or public affairs, given to Political Action Committees, or to support political candidates, parties, causes, and TRUST Defendant NATIONAL ELECTRICAL BENEFIT FUND illegally funnelled millions of dollars to political parties and politicians, causing one Trustee to resign.
>
> 38. Defendant UNION similarly expended funds for political or for lobbying activities not directly related to work conditions and gave to community services, union organizing or foreign affairs and publicity or public affairs, and to Political Action Committees and to support political candidates, parties, and causes.

(*First Amended Complaint* at 4-6).

Apparently Plaintiff included the allegations set forth in paragraphs 37 and 38 in order to have his Complaint fall within *Communications Workers of America v. Beck*, 487 U.S. 735

(1988). Plaintiff cited that case in correspondence to Radjewski and deems that the most relevant authority for this Court to review. Having reviewed *Beck*, the Court finds that *Beck* does not support Plaintiff's claim. To the contrary, it highlights congressional efforts to discourage what Plaintiff is attempting to accomplish here, which is to reap the benefits that Local 58 has negotiated with employers but to escape contributing financially.

In *Beck* the Court framed the issue before it as follows:

> Section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA), 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(3), permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees otherwise wish to become union members. Today we must decide whether this provision also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

Id. at 738.

The plaintiffs in *Beck* were employees of AT&T who chose not to become union members. They challenged the union's collection of "agency fees" from them to the extent that the fees were used for purposes other than collective bargaining, contract administration, or grievance adjustment, which the *Beck* Court denoted "'collective- bargaining' or 'representational" activities.'" *Id.* at 739-740. The plaintiffs specifically challenged their fees being used for the "organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events ...." *Id.* at 740. They claimed that the use of their fees for such purposes

violated their rights under § 8(a)(3 of the NLRA and the First Amendment. *Id.*

To determine whether the use of the plaintiffs' fees for the challenged activities violated § 8(a)(3) the Court reviewed the structure and purpose of § 8(a)(3). Its examination revealed that the drafters of that section had two aims in mind. One aim was to eliminate the barrier created by closed union shop agreements, i.e., agreements that required an employer to hire only persons who were already union members. *Id.* at 748. An equally significant goal was to prevent nonunion members from getting a free ride. *Id.*

> As Senator Taft, one of the authors of the 1947 legislation, explained, 'the argument ... against abolishing the closed shop ... is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expenses to himself.' 93 Cong.Rec. 4887 (1947), Leg.Hist. 1422. Thus the Taft-Hartley Act was 'intended to accomplish twin purposes.-On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost. *NLRB v. General Motors Corp.*, 373 U.S., at 740-741, 83 S.Ct., at 1458 (quoting S.Rep., at 6, Leg.Hist.412).

Id. at 748-749.

Thus, in enacting § (8)(a)(3), "'Congress recognized the validity of unions' concerns about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their *fair share* of financial support to such union, and gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of

employees for any other reason.'" *Id.* at 749, (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954))(emphasis added in *Beck*).

The *Beck* Court concluded:

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.' *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963). The statutory question presented in this case, then, is whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

Id. at 745.

In this case Plaintiff stands in much different shoes than the plaintiffs in *Beck*. Unlike the *Beck* plaintiffs, Plaintiff *is* an IBEW member. Plaintiff highlights the fact that he is not specifically a member of Local 58, but he also admits that Local 58 "is affiliated with Intern'l B'hood of Elect. Wkrs." (*Amended Complaint* at ¶ 4). Indeed, Plaintiff emphasizes that he has a contractual relationship with Local 58, and sites the IBEW Constitution at Article XX in support,

> Sec. 3 The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L.U. and the I.B.E.W., and between such member and all other members of the I.B.E.W.

Thus, unlike the *Beck* plaintiffs, Plaintiff is not being forced to pay dues by virtue of § 8(a)(3). Plaintiff elected to become a

member of the IBEW. Accordingly, the limitation that § 8(a)(3) places on use of nonmember dues is simply not implicated here.

Of equal significance, the *Beck* plaintiffs did not attempt to reap the benefits of the CBA but, at the same time, avoid making any financial contributions to the union. They objected only to the use of their dues for expenditures outside of the union's collective bargaining and representational activities. In contrast Plaintiff here acknowledges that he "worked as an electrician via job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ("CBA") between Defendant Local 58 and Detroit area electrical contractors," and that he was "a 'third party beneficiary' to a CBA between UNION and employers which contains a job Referral Procedure and an 'out-of-work list." (*Amended Complaint* at ¶¶ 3 & 15). Despite reaping those benefits Plaintiff insists that the Local 58 had "no right" to deduct dues from his wages or other non-members of the Local 58. (Amended Complaint at ¶ 19).

Plaintiff's position is directly contrary to the purpose of § 8(a)(3) as explained by the *Beck* Court. One of the twin aims of § 8(a)(3) was to prevent those who choose not to join a union from getting a free ride. Employees who enjoy the benefits of the collective bargaining agreement and other core activities of the union must pay their fair share. Since § 8(a)(3) requires even nonunion members to contribute to the costs of the CBA Plaintiff's protestation that he does not have to pay dues because he does not have a voice or vote in the CBA is unavailing. And his desire to gain employment and earn wages as a beneficiary of the CBA, but to avoid the negotiated overtime arrangements cannot withstand scrutiny.

Plaintiff argues that his dues are used for political and other non-core union activities. That claim is unsubstantiated. Plaintiff's only evidence is a November 1992 *I.B.E.W. Local 58 Newsletter*, in which Local 58 opined that then presidential candidate Bill Clinton's track record was on track with that of the union's, and a October/November 2001 *IBEW Journal* in which it was reported that Local 58 contributed $21,500 of the $341,500 that the IBEW contributed toward an election in Oklahoma. (*Plaintiff's December 14, 2001 Affidavit* at Ex A & B). These letters do not evidence that the dues paid went to

anything other than collective bargaining activities. The November 1992 newsletter did not report any financial contributions to political activity, and neither newsletter corresponded to the timing of Plaintiff's dues deductions.

Furthermore, Plaintiff's claims of constitutional violations are both factually and legally without merit. Although the *Beck* plaintiffs claim rested in part upon the First Instead, the Court found that it "need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." *Id.* at 761. This is important because "the conduct of private parties lies beyond the Constitution's scope in most instances ...." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991). So *Beck* is really no support of Plaintiff's constitutional claim.

Plaintiff also cites *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In that case the Court held that the employees' First Amendment rights were violated when they were required to contribute toward political causes that those employees opposed. "[T]he Constitution requires [] that [political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-236. But *Abood* has important distinctions from this case. First, the Abood case involved governmental employees, as the above quote indicates. Secondly, in *Abood*, the Court found the case to implicate the constitution because Michigan law sanctioned the use of nonunion members fees for purposes other than collective bargaining. *Id.* at 232. Hence, *Abood* involved both state actors and state action. Neither is present here.

Moreover, even though the *Abood* case involved state actions and state actors the court did not hold that the union was forbidden from participating in political activity. To the contrary the Court stated, "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood* at 235. Rather, the Court held that those activities could not be funded with the dues of objecting

employees. Thus, even if this case involved state action, Plaintiff's evidence that the Local 58 has been involved politically would have been insufficient to sustain his First Amendment claim. Plaintiff has not shown that his dues were used to fund political activities, much less any activities that he opposed.

The Court additionally notes factual allegations of Plaintiff's Count 1 that are unsustainable. Contrary to Plaintiff's claim otherwise, the dues deduction authorization was not submitted to Plaintiff in fine print. The phrase "PAYROLL DEDUCTION AUTHORIZATION" is the most prominent writing on the referral card that Plaintiff signed. (*Local 58 Br.* at Ex. C). Of further significance is the fact that Plaintiff did not initially claim that he was seeking a refund of his dues or to rescind his authorization because he was tricked into signing it. Rather, he specifically indicated that he wanted to rescind his authorization because his reciprocity form for his 1998 benefits was not honored; he wanted to rescind his authorization out of retaliation.

Furthermore, Plaintiff alleges that an unknown amount of benefits was taken from him. To the extent that Plaintiff means that Defendants deducted benefit payments from his salary, that allegation is directly contrary to the explanation that Radjewski gave to him. Radjewski repeatedly explained that benefits contributions are made from employers over and above the employees' wages. Moreover, to the extent that Plaintiff means that Defendants refused to send his 1998 benefits to his home fund, the record is clear that Plaintiff forgot to sign the reciprocity form until 2000. Thus, the benefits were not "nonexistent" or "unavailable," as Plaintiff contends. (*Amended Complaint* at ¶ 22). The benefits would have been sent to Plaintiff's home fund if he had timely submitted the reciprocity form.

At any rate, even if Plaintiff were able to sustain his factual allegations, they cannot support his First Amendment or Fifth Amendment claims because of the lack of state action.

C. <u>Counts II through V</u>

Plaintiff's additional counts are: Count II, for fraud and deceit; Count III, for breach of contract; Count IV, for breach of duty of fair representation; and Count V, for intentional infliction of emotional distress. The factual allegations described in Count I that have already been rejected form the basis of these latter

counts, and Defendants are therefore entitled to summary judgment on Counts II through V.

Furthermore, the Court finds that the claims against the Funds in Counts II, III and V are preempted by ERISA, *see, Lion's Volunteer Blind Ind., Inc. v. Automated Group Admin., Inc.*, 195 F.3d 803, 807 (6th Cir. 1999), and that Plaintiff's allegations against the Funds does not state a claim under ERISA. Plaintiff has not shown that ERISA prohibits fringe benefits funds from collecting contributions for employment arising out of a CBA from employers with which the union has negotiated the CBA.

Moreover, Plaintiff's breach of duty of fair representation claim against Local 58 and Radjewski is barred by the NLRA's six month limitation period, which began when Plaintiff knew or should have known of Local 58's alleged breach of its duty of fair representation. *Schoonover v. Consolidated Freightways Corp. of Delaware*, 49 F.3d 219, 221 (6th Cir. 1995). Plaintiff alleges that, *inter alia*, Local 58 and Radjewski deducted union dues without Plaintiff's authorization and without legal authority. (*Amended Complaint* at 77). Plaintiff attempted to rescind his dues deduction authorization as early as September 15, 2000. Thus, Plaintiff knew about the alleged wrongful due deductions over six months before filing his June 13, 2001 Complaint. Further, Plaintiff's allegations of fraud and deceit, breach of contract and intentional infliction of emotional distress arise out of the same alleged wrongful conduct that underlies the breach of duty of fair representation claim, and are therefore also barred by the six month limitation period. *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733, 735 (6th Cir. 1985).

IV. Conclusion

For the foregoing reasons, THE COURT GRANTS The Funds and Mittelbrun filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment **[document 9]** and the Local 58 and Radjewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-IV of Plaintiff's Complaint **[document 12]**.

Dated: MAR 18, 2002

Victoria A. Roberts
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CASE NO. 01-72222

JUDGMENT

In accordance with the Order entered on MAR 18, 2002, IT IS ORDERED that Judgment is entered in favor of Defendants.

Dated at Detroit, Michigan on MAR 18, 2002.

DAVID J. WEAVER
CLERK OF THE COURT

Victoria A. Roberts
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CASE NO. 01-72222

Order Denying Motion

Plaintiff has filed a Motion to Temporarily Vacate the Judgment and Allow Filing of a Motion to Reconsider an Order Granting Dismissal and Summary Judgment to the Defendants (filed April 9, 2002).

After review of Plaintiff's motion and brief, the motion is denied.

IT IS SO ORDERED.

Filed: APR 11, 2002

Victoria A. Roberts
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPEAL NO. 02-1503

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Before SILER, DAUGHTREY, and GILMAN, Circuit Judges.

Lawrence Moore, proceeding pro se, appeals a district court order dismissing his labor action filed pursuant to the Labor Management Relations Act, 29 U.S.C. § 185; the National Labor Relations Act, 29 U.S.C. § 158; the Employees Retirement Income Security Act, 29 U.S.C. § 1001 et seq.; and 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

On June 13, 2001 Moore filed suit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds for monetary and equitable relief. Moore asserted in his complaint that: 1) the defendants violated his rights under the Free Speech Clause and the Takings Clause; 2) the defendants committed fraud and deceit; 3) the defendants breached the Collective Bargaining Agreement ("CBA"); 4) Local 58 and Radjewski breached their duty of fair representation; and 5) the defendants intentionally inflicted emotional distress. Upon consideration of the pleadings the district court granted the defendants' motions to dismiss, or, in the alternative, for summary judgment.

In his timely appeal Moore essentially reasserts his claims and argues that the district judge should have recused herself.

Upon de novo review we conclude that the district court's judgment must be affirmed. *See* Fed.R.Civ.P. 12(b)(6) and 56(c); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995); *Wright v. MetroHealth Med. Ctr.*,

58 F.3d 1130, 1138 (6th Cir. 1995).

Moore's five claims substantially overlap and are based on virtually identical allegations. Moore, who was not a member of Local 58 but was a member of an affiliated union, received job referrals through Local 58's hiring hall to perform electrical work in July, 1998 and from the week ending September 16, 2000, through the week ending November 4, 2000. Moore's main complaint is that Local 58 supposedly tricked him into signing the union dues deduction form and would not refund the money or stop the withdrawals after he rescinded his authorization in a letter dated September 15, 2000. His other primary allegations were that Local 58 deducted the money while denying him a voice as a non-member, that the CBA did not permit deductions from the wages of non-members for union dues, that the defendants reduced his overtime pay rate, and that the defendants used the money deducted to make political contributions.

Moore's complaint lacked merit. Moore's first claim, in which he asserts that the defendants violated his constitutional rights, is not actionable. Generally, "the conduct of private parties lies beyond the Constitution's scope ...." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

Moore's other federal claim, breach of a duty of fair representation, is time-barred by the six-months statute of limitations for unfair representation claims. *Adkins v. Int'l Union of Elec., Radio & Mach. Workers*, 769 F.2d 330, 335 (6th Cir. 1985) (citations omitted). "[T]he statute of limitations begins to run when the claimant knows or should have known of the union's alleged breach of its duty of fair representation." *Schoonover v. Consol. Freightways Corp.*, 49 F.3d 219, 221 (6th Cir. 1995); *see also Adkins*, 769 F.2d at 335. Moore should have known of any alleged breach of the duty of fair representation well before he completed the second job during the week ending November 4, 2000. Moore, however, did not file his complaint within six months, but waited seven months, until June 13, 2001.

Moore's state law claims are based upon the same allegations as his federal claim of a breach of the duty of fair representation and thus are preempted by federal labor law and are also time-

barred. "The duty of fair representation relates to an area of labor law which has been so fully occupied by Congress so as to foreclose state regulation." *Maynard v. Revere Copper Prods., Inc.* 773 F.2d 733, 735 (6th Cir. 1985); *see also In re Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local No. 173*, 983 F.2d 725, 728-29 (6th Cir. 1993). Moreover, when a federal claim of a breach of the duty of fair representation is barred by the six-month statute of limitations, "it would be anomalous to hold that the same claim survived the defense of limitations because it was stated in terms of state law." *Maynard*, 773 F.2d at 735.

Finally, the district judge did not abuse her discretion by failing to recuse herself. Moore was not entitled to recusal under 28 U.S.C. § 144 because he did not file an affidavit alleging judicial bias in the district court. *See United States v. Sammons*, 918 F.2d 592, 598-99 (6th Cir. 1990). Furthermore, the judge was not obligated to recuse herself pursuant to 28 U.S.C. § 455(a). A judge must only recuse herself where a reasonable person would be convinced that personal or extrajudicial bias exists. *Id.* at 599. No reasonable person would be convinced that the judge was biased against Moore. All of Moore's allegations referred to the judge's participation in the proceedings and do not support recusal. *See Id.*

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT.

Filed: SEP 13, 2002

Leonard Green
Clerk

Supreme Court, U.S.
FILED
JAN 17 2003

No. 02-920

IN THE

Supreme Court of the United States

LAWRENCE MOORE,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO.58, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PATRICIA J. FABRIZIO *
HOPE L. CALATI
SACHS WALDMAN, PC
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Has Petitioner presented a compelling reason for the Supreme Court to review the decision of the Sixth Circuit Court of Appeals to dismiss Petitioner's claims under the First and Fifth Amendments to the Constitution with respect to the Funds because they failed to allege any government action, nor could they do so?

2. Has Petitioner shown that a conflict exists between the decision of the Sixth Circuit Court of Appeals to dismiss Petitioner's claims under the First and Fifth Amendments to the Constitution with respect to the Funds and the Supreme Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), which does not address the applicability of the First or Fifth Amendment to fringe benefit funds such as the Respondent Funds?

3. Has Petitioner raised any other reason sufficient to compel the Supreme Court to review the lower courts' decisions in this case?

Respondent Funds say that the answers to all are "no".

LIST OF PARTIES

Petitioner:

LAWRENCE MOORE

Respondents Funds:

IBEW LOCAL NO. 58 ANNUITY FUND; ELECTRICAL WORKERS' PENSION TRUST FUND of LOCAL NO. 58; IBEW, DETROIT, MICHIGAN; ELECTRICAL WORKERS' INSURANCE FUND; APPRENTICE & JOURNEYMAN TRAINING TRUST of the ELECTRICAL INDUSTRY, DETROIT, MICHIGAN; SOUTHEAST MICHIGAN ELECTRICAL INDUSTRY LABOR MANAGEMENT COOPERATION TRUST FUND; SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN of the ELECTRICAL INDUSTRY, DETROIT, MICHIGAN; ELECTRICAL WORKERS' JOINT BOARD of TRUSTEES VACATION FUND; ELECTRICAL WORKERS JOINT BOARD of TRUSTEES; and THOMAS MITTELBRUN.

Non-Respondent Defendants:

IBEW LOCAL NO. 58; JEFF RADJEWSKI.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS THE PETITION SHOULD BE DENIED	4
I. THE SIXTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S CLAIMS AGAINST RESPONDENTS FUNDS UNDER THE FIRST AND FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT COURT OR THIS COURT	4
II. PETITIONER RAISES NO ARGUMENT CONCERNING THE LOWER COURTS' PROPER CONCLUSION THAT HIS STATE LAW CLAIMS ARE PREEMPTED	6
CONCLUSION	7

TABLE OF CONTENTS—Continued

Page

APPENDICES

A. Order of the United States Court of Appeals for the Sixth Circuit 1a

B. Petitioner's Appeal to Sixth Circuit 5a

C. Judgment from United States District Court for the Eastern District of Michigan, Southern Division, Case No. 01-72222 ..... 36a

D. Order of the United States District Court for the Eastern District of Michigan, Southern Division, Case No. 01-72222 ..... 37a

E. Petitioner's First Amended Complaint 54a

TABLE OF AUTHORITIES

CASES — Page

Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) 5

Carpenters v. Scott, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) 5

Communications Workers of America v. Beck, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) 5

Driscoll v. Int'l Union of Operating Engineers, Local 139, 484 F.2d 682 (7th Cir. 1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974) 6

Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976) 4

National Board of YMCA v. United States, 395 U.S. 85, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969). 5

STATUTES

ERISA, 29 USC §1001, *et seq* 3

ERISA, 29 USC §1002(2) 4

ERISA, 29 USC §1002(1) 4

COURT RULES

Fed.R.Civ.P. 12(b)(6) 3

Fed.R.Civ.P. 56(c) 3

Sup.Ct.R. 10 4

IN THE

Supreme Court of the United States

No. 02-920

LAWRENCE MOORE,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO.58, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents IBEW Local No.58 Annuity Fund; Electrical Workers' Pension Trust Fund of Local No.58 IBEW, Detroit, Michigan; Electrical Workers' Insurance Fund; Apprentice & Journeyman Training Trust of the Electrical Industry, Detroit, Michigan; Southeast Michigan Electrical Industry Labor Management Cooperation Trust Fund; Supplemental Unemployment Benefit Plan of the Electrical Industry, Detroit, Michigan; Electrical Workers' Joint Board of Trustees Vacation Fund; Electrical Workers Joint Board of Trustees; and Thomas Mittelbrun, (hereinafter *Respondents Funds*), hereby oppose the Petition for a Writ of Certiorari by

Petitioner Lawrence Moore (hereinafter *Petitioner*) to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

Respondents hereby adopt and incorporate all opinions and orders below that are set forth in Appendices A through E herein attached.

STATEMENT OF THE CASE

Petitioner is an electrician who performed work covered by a collective bargaining agreement negotiated by the International Brotherhood of Electrical Workers Local No. 58 (hereinafter "IBEW No. 58") for two employers signatory to that agreement within the geographic jurisdiction covered by that agreement. Respondents Funds are the fringe benefits funds established by collective bargaining by IBEW No. 58, and an employee of the Funds who administers those Funds on a day-to-day basis. All of the Respondents Funds except for the Southeast Michigan Electrical Industry Labor Management Cooperation Trust Fund received negotiated employer fringe benefit contributions based on Petitioner's work for the signatory employers. The Southeast Michigan Electrical Industry Labor Management Cooperation Trust Fund was not in existence at the time of Petitioner's work, and accordingly no employer contributions were ever received by that Fund based on Petitioner's work.

Petitioner filed his First Amended Complaint on October 9, 2001, in the United States District Court for the Eastern District of Michigan, Southern Division, alleging with respect to Respondents Funds violations of the First and Fifth Amendments to the United States Constitution, and three counts of contract and tort claims under Michigan law. Appendix E. Respondents Funds filed a Motion to Dismissal for Failure to State a Claim on Which Relief Can Be Granted,

pursuant to Fed.R.Civ.P. 12(b)(6), or alternatively, for Summary Judgment, pursuant to Fed.R.Civ.P. 56(c). On March 18, 2002, the United States District Court for the Eastern District of Michigan granted Respondents Funds' Motions. Appendix D. The District Court also simultaneously entered judgment for Respondents Funds, incorporating its order by reference. Appendix C. In its Order, the District Court dismissed Petitioner's claims under the United States Constitution because they did not fall within the scope of activity protected by the United States Constitution as actions by a private, not governmental, actor. Appendix D, Order at 15. The District Court also dismissed Petitioner's state law claims with respect to the Respondents Funds because they are all preempted by the Employee Retirement Income Security Act of 1974, 29 USC Section 1001, *et seq*, (hereinafter "ERISA"). Appendix D, Order at 17-18.

Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit, restating his constitutional and state law claims, and adding a claim of judicial bias. Appendix B. Using a *de novo* standard of review, the Court of Appeals affirmed the District Court's judgment in its entirety. Appendix A. In its Order, the Court of Appeals first affirmed the District Court's dismissal of Petitioner's Constitutional claims because private conduct is beyond the reach of the United States Constitution. Appendix A, Order at 2. It also affirmed the District Court's determination that the state law claims were preempted by federal law. As to Petitioner's claims of judicial bias, raised for the first time on appeal, the Court of Appeals rejected Petitioner's claim, noting that Petitioner failed to file a timely affidavit alleging bias, and also that District Court Judge Roberts was not compelled to recuse herself because Petitioner's allegations of bias related only to her participation in the proceedings themselves. Appendix A, Order at 3.

Petitioner now seeks this Court's review of the Court of Appeals' decision. The petition should be denied because Petitioner has not asserted any "compelling reasons" for this Court to review the Court of Appeals' decision as required by Supreme Court Rule 10.

REASONS THE PETITION SHOULD BE DENIED

I. THE SIXTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S CLAIMS AGAINST RESPONDENTS FUNDS UNDER THE FIRST AND FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT COURT OR THIS COURT.

Petitioner's claims under the First and Fifth Amendments to the United States Constitution were raised against Respondents Funds, which are private employee pension benefit plans and employee welfare benefit plans (as defined by ERISA, 29 USC Section 1002(2) and 1002(1) respectively) and their salaried administrator in that capacity. Appendix E, pp 4-7, ¶¶ 14-47. The Sixth Circuit Court of Appeals affirmed the District Court's determination that relief cannot be granted upon those claims and were properly dismissed pursuant to Fed.R.Civ.P. 12(b)(6) and 56(c), respectively. Appendix A, Order at 2.

The appellate court's decision followed long-established black-letter law that the First Amendment guarantees of free speech and the takings clause of the Fifth Amendment regulate actions by government entities only, and have no applicability to non-governmental entities. Respondent Funds are not government entities regulated by the First and Fifth Amendments. *See Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1193 (7th Cir. 1976) ("The guaranties

of the First Amendment run only against the federal government, not private interference."), cited with approval in *Carpenters v. Scott*, 463 U.S. 825, 832, 103 S. Ct. 3352, 77 L.Ed. 2d 1049 (1983) ("[T]he Court of Appeals for the Seventh Circuit was thus correct in holding that a conspiracy to violate the First Amendment is not made out with proof of state involvement."); *National Board of YMCA v. United States*, 395 U.S. 85, 89, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969) ("The Just Compensation Clause was 'designed to bar *Government* from forcing some people alone to bear *public* burdens which, in all fairness and justice, should be borne by the *public* as a whole'", quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (emphasis added). Petitioner asserts that "unions that are 'certified' by a federal government administrative agency as the government's 'exclusive representative' of all the employees in a 'bargaining unit' are 'state actors'" (Petition at 9) in an attempt to salvage his Constitutional claims. However, even if his contention had any merit with respect to unions, it has no bearing on Respondents Funds, which are *not* unions. Petitioner appears to argue that the Sixth Circuit's decision that actions of the Respondent Funds, which are non-governmental entities, are not actionable under the First or Fifth Amendments conflicts with this Court's decision in *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641, 101 L.Ed 2d 634 (1988). The *Beck* decision addresses whether a union may charge a non-member for costs unrelated to negotiating collective bargaining agreements. That decision does *not* address whether fringe benefit funds such as the Respondent Funds are governmental entities whose conduct is circumscribed by the First or Fifth Amendments. Therefore, no conflict could possibly exist which concerns the Respondent Funds because *Beck has* no applicable to fringe benefit funds.

The Court of Appeals for the Sixth Circuit correctly affirmed the District Court's determination that Petitioner's

First and Fifth Amendment claims failed to state a claim upon which relief could be granted because they are raised against private actors. Appendix A, Order at 2. There is simply no set of facts which could be developed which could support such a claim. *See Driscoll v. Int'l Union of Operating Engineers, Local 139*, 484 F.2d 682 (7th Cir. 1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974). Petitioner's Constitutional claims were properly dismissed by the District Court and this dismissal was properly affirmed by the Court of Appeals based on long-established and uniform black-letter law. Therefore, the Petition should be denied.

II. PETITIONER RAISES NO ARGUMENT CONCERNING THE LOWER COURTS' PROPER CONCLUSION THAT HIS STATE LAW CLAIMS ARE PREEMPTED.

Counts II, III and V of Petitioner's First Amended Complaint allege a variety contract and tort claims under Michigan law against Respondents Funds. Appendix E. Specifically, Count II alleges fraud and deceit, Count III alleges breach of contract, and Count V alleges intentional infliction of emotional distress. The District Court dismissed these claims as preempted by ERISA. Appendix D, Order at 17-18. The Court of Appeals affirmed this determination. Appendix A, Order at 2-3. The Petition raised no arguments concerning these holdings, and accordingly this Court should consider those issues as waived in their entirety by Petitioner.

CONCLUSION

Petitioner's claims of violations of the First and Fifth Amendments to the U.S. Constitution fail to state a claim upon which relief can be granted against Respondent Funds, which are private actors, and these claims were properly dismissed by the District Court, and this dismissal was properly affirmed by the Court of Appeals. Petitioner raises no arguments concerning the dismissal of his state law claims against the Funds, which were properly dismissed by the District Court because they are preempted by ERISA, and this dismissal was properly affirmed by the Court of Appeals.

Respondents Funds accordingly respectfully request that this Court deny the Petition for Writ of Certiorari as to the aforementioned matter with respect to the Respondent Funds.

Respectfully submitted,

PATRICIA J. FABRIZIO *
HOPE L. CALATI
SACHS WALDMAN, PC
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Sept 13, 2002]

No. 02-1503

LAWRENCE MOORE,
Plaintiff-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 58, *et al.*,

Defendants-Appellees.

Before: SILER, DAUGHERTY, and GILMAN, *Circuit Judges.*

Lawrence Moore, proceeding pro se, appeals district court order dismissing his labor action filed pursuant to the Labor-Management Relations Act, 29 U.S.C. § 158; the Employees Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*; and 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rule of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P.34(a).

On June 13, 2001, Moore filed suit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds for monetary and equitable relief. Moore asserted in his complaint that: 1) the defendants violated his rights under the Free Speech Clause and the Takings Clause; 2) the defendants committed fraud and deceit; 3) the

defendants breached the Collective Bargaining Agreement ("CBA"); 4) Local 58 and Radjewski breached their duty of fair representation; and 5) the defendants intentionally inflicted emotional distress. Upon consideration of the pleadings, the district court granted the defendants' motions to dismiss, or, in the alternative, for summary judgment.

In his timely appeal, Moore essentially reasserts his claims and argues the district judge should have rescued herself.

Upon de novo review, we conclude that the district court's judgment must be affirmed. *See* Fed. R. Civ. P.12(b)(6) and 56(c); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.,* 64 F.3d 1015, 1019 (6th Cir. 1995); *Wright v. Metro Health Med Ctr.,* 58 F.3d 1130, 1138 (6th Cir. 1995).

Moore, who was not a member of Local 58 but was a member of an affiliated union, received job referrals through Local 58's hiring hall to perform electrical work in July 1998 and from the week ending September 16, 2000, through the week ending November 4, 2000. Moore's main complaint is the Local 58 supposedly tricked him into signing the union dues deduction authorization in a letter dated September 15, 2000. His other primary allegations were that Local 58 deducted the money while denying him a voice as a non-member, that the CBA did not permit deductions for the wages or non-members for union dues, that the defendants reduced his overtime pay rate, and that the defendants used the money deducted to make political contributions.

Moore's complaint lacked merit. Moore's first claim, in which he asserts that the defendants violated his constitutional rights, in not actionable. Generally, "the conduct of private parties lies beyond the Constitution's scope . . . ." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 620 (1991).

Moore's other federal claim, breach of a duty of fair representation, is time-barred by the six-month statute of

limitations for unfair representation claims. *Adkins v. Int'l Union of Elec. Radio & Mach. Workers*, 769 F.2d 330, 335 (6th Cir. 1985) (citations omitted). "[T]he statute of limitations begins to run when the claimant knows or should have known of the union's alleged breach of its duty of fair representation. " *Schoonover v. Consol. Freightways Corp.*, 49 F.3d 219, 221 (6th Cir. 1995); *see also Adkins*, 769 F.2d at 335. Moore should have known of any alleged breach of the duty of fair representation well before he completed the second job during the week ending November 4, 2000. Moore, however, did not file his complaint within six months but waited seven months, until June 13, 2001.

Moore's state law claims are based upon the same allegations as his federal claim of a breach of the duty of fair representation and thus are preempted by federal labor law which has been so fully occupied by Congress so as to foreclose state regulations." *Maynard v. Revere Copper Prods, Inc.*, 773 F.2d 725, 728-29 (6th Cir. 1993). Moreover, when federal claim of a breach of the duty of fair representation is barred by the six month statute of limitations, "it would be anomalous to hold that the same claim survived the defense of limitations because it was stated in terms of state law." *Maynard*, 773 F.2d at 735.

Finally, the district judge did not abuse her discretion by failing to rescue herself. Moore was not entitled to recusal under 28 U.S.C. § 144 because he did not file an affidavit alleging judicial bias in the district court. *See United States v. Sammons*, 918 F.2d 592, 598-99 (6th Cir. 1990). Furthermore, the judge was not obligated to recuse herself pursuant to 28 U.S.C. § 455(a). A judge must only recuse herself where a reasonable person would be convinced that the judge was biased against Moore. All of Moore's allegations referred to the judge's participation in the proceedings and do not support recusal. *See id.*

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C) Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ [Illegible]
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Appeal No. 02-1503

U.S.D.C. No. 01-72222

LAWRENCE MOORE

Plaintiff/Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 58; LOCAL 58 ANNUITY FUND; LOCAL 58 PENSION TRUST; LOCAL 58 HEALTH WELFARE TRUST; LOCAL 58 TRAINING TRUST; LABOR-MANAGEMENT COOP FUND; LOCAL 58 SUB PAY FUND; LOCAL 58 VACATION PAY FUND; JEFF RADJEWSKI; ELECTRICAL WORKERS JOINT BOARD OF TRUSTEES; THOMAS MITTELBRUN; NATIONAL ELECTRICAL BENEFIT FUND; AND NATIONAL ELECTRICAL ANNUITY FUND,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF MICHIGAN

REPLY BRIEF OF THE APPELLANT

LAWRENCE MOORE
P.O. Box 140901
Toledo, OH 43614
(419) 472-8509

Appellant Pro Se

TABLE OF CONTENTS

	Page
I. STATEMENT REQUESTING ORAL ARGUMENT	1
II. INTRODUCTION	2
A. ANALYSIS OF DEFENDANTS' STATEMENT OF THE CASE	2
B. ANALYSIS OF DEFENDANTS' STATEMENT OF FACTS	2
C. ANALYSIS OF SUMMARY OF ARGUMENT AND ARGUMENT	4
III. ARGUMENT	6
A. UNION ARGUMENTS PLAINTIFF'S ARGUMENTS ARE IMPERTINENT AND HIS "CLAIMS" ARE "WITHOUT MERIT" ARE WITHOUT MERIT	6
B. UNION AND FUNDS ARGUMENTS CONSTITUTIONAL CLAIMS WERE CORRECTLY DISMISSED FOR NO STATE ACTION ARE WITHOUT MERIT	8
C. STATUTES OF LIMITATIONS AND ERISA PREEMPTION ARGUMENTS DON'T MITIGATE THE UNION AND UNION FUNDS' THEFTS OF WAGES	11
V. CONCLUSION	12
CERTIFICATE OF COMPLIANCE WITH RULE	32
ADDENDUM (Statement Re Contents of the Appendix)	1

TABLE OF CONTENTS—Continued

Page

ADDENDUM EXHIBIT 1

Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401, 402, and 411) with Findings, Purposes, and Policy related to the Labor Management Relations Act of 1947, to "union membership," and to "union dues."

TABLE OF AUTHORITIES

CASES Page

Beck v. Communications Workers of America,468 F.Supp. 93 (1979)..... 5
Beck v. Communications Workers of America, 776 F.2d 1187 (4th Cir. 1985) 5
Beck v. Communications Workers of America, 800 F.2d 1280 (1986)..... 5
Carpenters UNION Local no. 25 v. N.L.R.B., 769 F.2d 574 (9th Cir. 1985) 6
Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) 5, 10
Communication Workers of America v. Beck, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d (1988)..5, 8-10
Int'l Assoc. of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961)..... 10
Local 357, Internat'l Bro. of Team, etc. v. N.L.R.B., 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961)..... 6
Meade v. Pension Appeals and Review Committee, 966 F.2d 190 (6th Cir. 1992)..... 12
Miller v. Currie, 50 F.3d 373 (6th Cir. 1995)..... 7
N.L.R.B. v. Amax Coal Co., 453 U.S. 321, 101 S.Ct. 2789 (1981)..... 11
Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989)..... 11
Radio Officers' *Union, etc. v. N.L.R.B.*, 347 U.S. 49, 74 S.Ct. 323 (*1954*)..... 6
Railway Employees v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1132 (1956)..... 10
Reed v. United Transp. Union, 488 U.S. 317, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989)..... 5, 11
Wooddell v. IBEW Local 71, 502 U.S. 93, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991)..... 7

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES: Page

U.S. Constitution, First Amendment 8-10
Federal Rule of Civil Procedure 12(b)(6) 2, 7
Employees Retirement Income Security Act ("ERISA"), 88 Stat. 29 (29 U.S.C. § 1001, *et seq.*) 3-4, 9
Employees Retirement Income Security Act ("ERISA") § 4(a) (29 U.S.C. § 1003) 4, 11
National Labor Relations Act ("N.L.R.A."), 49 Stat. 452 ..... 1, 9
National Labor Relations Act, as amended, Labor Management Relations Act ("L.M.R.A.") § 158(a) (3) (29 U.S.C. 158) 4-10
National Labor Relations Act § 10(b) (29 U.S.C. § 160) 5, 8, 10
Labor Management Relations Act § 302 (29 U.S.C. 186) 2, 9, 12
Labor Management Relations Act § 302(c) (5) (A) (29 U.S.C. 186) 4, 11
Labor Management Reporting and Disclosure Act ("L.M.R.D.A.") § 2 (29 U.S.C. 401) 1
Railway Labor Act ("R.L.A.") § 2, Eleventh (45 U.S.C. § 152, Eleventh) 10

I. STATEMENT REQUESTING ORAL ARGUMENT

Oral argument should be permitted to explicate issues related to why UNION' s dual roles as (1) a UNION *per se*, (2) National Labor Relations Act certified "exclusive representative" of a "bargaining unit" made up of electricians who are not members of the UNION, and of UNION's members, (3) an administrator of a collective bargaining agreement ("CBA") created Out-Of-Work List, and (4) a sponsor, and fiduciary of its "special purpose funds" subvert existing laws.

It is also important to explain how, and why UNION circumvents Congressal intent in passing the Labor Management Relations Act, to eliminate unions' and employers' abuse of workers in "closed shops" (created by the National Labor Relations Act, aka "Wagner Act") , by abusing their dual roles and how dues are extorted from non-members by violations of the Labor-Management Reporting and Disclosure Act, which Congress also enacted because of union and employers' ongoing

> "breaches of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct [and to] eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended . . . ."

Labor-Management Reporting and Disclosure Act, § 2 (29 U.S.C. 401).

Plaintiff should be permitted to explain how UNION DEFENDANTS have preserved improper "closed shop" practices made illegal by the Labor Management Relations Act of 1947, which amended that National Labor Relations Act specifically to eliminate "closed union shops," and how

intents of Congress in passing the L.M.R.A., and L.M.R.D.A. and of the federal courts to unburden a flow of interstate commerce are illegally frustrated by improper, tribalistic union practices.

II. INTRODUCTION

A. ANALYSIS OF DEFENDANTS' STATEMENTS OF THE CASE

LOCAL 58 and RADJEWSKI Defendants ignored the issues presented on appeal by PLAINTIFF and tried to minimize illegal "takings" from his wages by violating a Paycheck Protection Law passed by Congress in 1947 to stop such "takings" by unions and employers—who act in concert—(Labor Management Relations Act §302 ("LMRA") (29 U.S.C. 186 ("LMRA")) and glossed over the fact they filed an Answer to his First Amended Complaint denying its allegations before their filing of a F.R.Civ. P.12(b)(6) motion (which filing necessarily admits the allegations but denies their sufficiency), avoided their failure to answer interrogatories and requests for production of documents the Court had also ignored by granting them "summary judgment" and went straight to the fraud in district court on PLAINTIFF'S letters.[1]

---

[1] Misrepresenting an October 15, 2000 letter misdated September 15 to RADJEWSKI, who breached a duty of fair representation to LOCAL 58 non-members in the "Bargaining Unit" represented by LOCAL 58 by wrongfully forcing an employer to lay-off only PLAINTIFF and all the other non-members in 1998—while promising them they would be the first re-hires—after General Motors "locked-out" everyone in the face of a U.A.W. threat to strike, despite that employer's offer to transfer PLAINTIFF to another job during the lock-out (which PLAINTIFF had accepted), and cheated them out of the jobs permanently by afterwards forcing that employer to instead hire only new employees who were LOCAL 58 members. The district court's final Order eagerly embraced that fraud in a "Background" section.

UNION FUNDS Defendants also glossed over the facts their UNION co-Defendants first "answered" PLAINTIFF'S First Amended Complaint, then absolutely refused to respond to discovery requests, and moved successfully to dismiss and/or for summary judgment.

B. ANALYSIS OF DEFENDANTS' STATEMENT OF THE FACTS

UNION Defendants conveniently ignored their forcing PLAINTIFF, who worked in the same bargaining unit in the 60s and 70s, to leave Detroit after he complained about "favoritism" to union's "members" in administering the collective bargaining agreement's ("CBA") Out-Of-Work List, they delusionally alleged that area of Michigan where PLAINTIFF worked was a "jurisdiction of LOCAL 58," minimized their role in forcing Hall Engineering to fire him in 1998, justified the thefts from his wages by argument he had not completed "reciprocity forms," [2] appealed to "time limit of one year allowed by the Plan" invalidly as the self-serving authority to steal non-members' wages (referring to PLAINTIFF's attempts to effect a compromise as asked for assistance) referred to a job Referral Card issued in a "hiring hall" (necessary to report to any employer to prove its "job offer" was accepted in the hiring hall by the bearer) instead as the "dues deduction card" and demonized PLAINTIFF for

---

[2] Only monies taken from PLAINTIFF'S wages by UNION'S two ERISA-covered Pension and Health Welfare FUNDS Defendants can be "reciprocated" to some other similar Union "home fund," and Health Welfare Fund only "reciprocates" a portion of its "takings" from non-members' earned wages, while all other UNION FUNDS keep their entire takings, which the employers agree to because UNION lets them take FUNDS monies—which they euphemistically call "contributions" to the UNION FUNDS—off the top of the negotiated hourly wage prior to calculating "over-time" pay rates, thereby also cheating the non-members out of the correct "over-time" pay rates when they work over-time.

writing letters to that gang of LOCAL 58 thieves (admitting PLAINTIFF's first refund demand was December 12, 2000).

UNION FUNDS Defendants begged questions whether this PLAINTIFF agreed to let them "take" parts of his "earned wages" [3] (he didn't), misrepresented they are all "governed by ERISA" (only funds created pursuant to LMRA § 302(c)(5) (A) (29 U.S.C. 186) for pensions or health care are covered by ERISA § 4(a)(29 U.S.C. 1003), begged questions whether UNION and UNION FUNDS were required to include a conspiracy to defraud non-members in the CBA with employers, whether employers are "*required* [to] submit employer fringe *contributions*" (oxymoron) to the UNION Defendants for this non-member PLAINTIFF (relying only on their self-serving FUNDS administrator as authority), called the wrongful "takings" from PLAINTIFF'S wages "contributions in respect to hours worked by him," misrepresented "All" the monies taken were sent to some "home funds in Toledo," even while they admitted money wrongfully taken by their UNION "Vacation Fund" was not and that it also stole "interest" on monies they held for a year, and relied on only unsupported statements by the same thieving "administrator" to try to convince this Court one of the "UNION FUNDS" was not created until June 3, 2001 in their face of refusals to allow nonmembers to see CBAs they

---

[3] LOCAL 58, acting as a National Labor Relations Board-certified "exclusive representative" for a "bargaining unit" made up of both its members and non-members negotiates wage increases as part of a collective bargaining agreement with employers. No non-members are on that appointed-by-LOCAL-58's-president "negotiating committee." LOCAL 58 *per se* then meets in closed meetings of its members to vote on amounts of the negotiated hourly wage they want to defer into LOCAL 58's "special purpose funds." Amounts agreed on are then included into the CBA, even though they are agreements made only between employers and LOCAL 58 members (not the "bargaining unit"), and those UNION FUNDS then also wrongfully also take those same amounts from the earned wages of non-members without authorization.

work under (which have the information), and refusals to produce any CBAs in "discovery" (PLAINTIFF's knows an affiliated International Union ordered such FUNDS created in the mid 1980s (as sworn to in his affidavits in the lower court)).

C. ANALYSIS OF DEFENDANTS' SUMMARY OF ARGUMENT AND ARGUMENT

UNION Defendants *Summary*, argued the PLAINTIFF'S constitutional and NLRA § 8(a)(3) "duty of fair representation" claims are without merit, it patronized the lower court's decision, and jingoistically demonized PLAINTIFF and by extension the "claims." The UNION FUNDS' *Summary*, begged the ironic question whether they may seek protection in an Employees Retirement Income Security Act ("ERISA") for taking the non-member employee's income he will need in retirement.

Defendants evaded controlling *Communication Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed. 2d (1988) rulings (and two *Beck v. C.W.A.* published decisions by the Fourth Circuit affirming a district court's published decision that such "takings" by unions from non-members violate the First and Fifth Amendments) finding "governmental action" because that union abused ability to take employees' wages via N. L. R. A. § 8(a)(3)(29 U.S.C. 158(a)(3)).

UNION and FUNDS instead patronized a lower court's Balkanizing rejections of Supreme Court rulings in that decision and in *Reed v. United Transp. Union*, 488 U.S. 317, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) (use of NLRA § 10(b) 6 months statute of limitations is exception to rule state general or residual personal injury statutes of limitations normally govern disputes with an indirect impact on labor peace or relations between unions and employers).

UNION Defendants also dishonestly ignored . the Supreme Court's holding in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d (1986) (procedural safequards must be carefully tailored to prevent union violations of such non-union employees First Amendment rights in paying required agency fees).[4]

Defendants asked the Court to dismiss this appeal on grounds he was not nice to that UNION boss who stole his property (and his job in 1998) or nice to a lower court which aberrated the facts and law to legitimize their wrongful takings, and suggested that this Court also use a "misdated letter" fraud, while the thieving FUNDS asked this Court to just take their word, and not allow discovery.

III. ARGUMENT

A. UNION ARGUMENTS PLAINTIFF'S ARGUMENTS ARE IMPERTINENT AND HIS "CLAIMS" ARE "WITHOUT MERIT" ARE WITHOUT MERIT.

UNION argued PLAINTIFF is "impertinent" in seeking declaratory relief from a biased and partial lower court and wrongful "takings" of non-members' wages and dishonestly limited an amount stolen from him to recently taken dues (ignoring its FUNDS' concurrent takings, and both UNION and UNION FUNDS' takings from his wages and wages of other non-members in the past). It also made unsupported arguments that the PLAINTIFF's "claim" he needed "discovery to prove that the Union selectively used the hiring

---

[4] Citations to all those authorities were included in PLAINTIFF'S "statement of controlling authority," which the lower court required at the very beginning of all Briefs in support of and/or in opposition to the UNION and UNION FUNDS Defendants' motions to dismiss or alternately for summary judgment.

hall to steal money . . . is without merit," despite its refusals to answer his timely-served requests.

In debates on the Labor Management Relations Act of 1947 (29 U.S.C. 158) (N.L.R.A. § 8(a)(3), as amended), which Congress passed to outlaw "compulsory unionism [of] closed shops" Senator Taft, the Act's principal author, "made clear his view . . . that unions should be able to operate ["hiring halls"] so long as they are not used to create a closed shop." *Local 357, Internat'l Bro. Of Team, etc. v. N.L.R.B.*, 565 U.S. 667, 673-74, 81 S.Ct. 835, 838-39, 6 L.Ed.2d 11 (1961) (NLRA § 8(a) (3) language outlawing discrimination in the encouragement or discouragement of union membership is not ambiguous, and it is the "true purpose" or "real motive" in hiring, or firing that constitutes the test), *citing Radio Officers' Union, etc. v. N.L.R.B.*, 347 U.S. 17, 39-45, 74 S.Ct. 335-37 (1954) (where union deprived an employee of his protected right by causing employer to discriminate by denying him employment in order to coerce him into following union-desired hiring practices). *See Carpenters UNION Local no. 25 v. N.L.R.B.*, 769 F.2d 574 (9th Cir. 1985).

Thus PLAINTIFF'S discovery "claim" is neither "without merit," nor unique and Defendant UNION has illegally maintained its "closed shop" for over fifty (50) years in the face of Congressional intent and Labor Management Relations Act § 158 (a) (3) by intimidating non-members to pay "dues" and "special purpose funds monies" which they get nothing or little for, by threats of blacklisting, and worse in a hiring hall so it can fill its coffers with money used to control a local cabal of "members" it promises inflated pensions, and other FUNDS "benefits" from wages taken from non-members while giving the "members" discriminatory preferences in receiving jobs and enabling it to by protection from "pertinent" politicians.

This Court has very clearly ruled on the issue of "discovery" in reviewing grants of motions to dismiss, or for summary judgment,

> On a Fed.R.Civ.P. 12(b)(6) motion, all of Plaintiff's allegations contained in the complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion.
>
> * * * *
>
> When a federal court reviews the sufficiency of a complaint, before the reception of evidence . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. (Citations omitted.)

Miller v. Currie, 50 F.3d 375, 377 (6th Cir. 1995).

LOCAL 58, which justified its "takings" from PLAINTIFF's wages on grounds he is liable for "dues" as a "member" because he belongs to a separate affiliated international union, lost its way, at p.17 of its Brief by arguing he cannot sue it "because he is not a LOCAL 58 member." UNION's argument that he can't sue it or RADJEWSKI for breaching the international union's constitution and for failing to live up to its own CBA is more hysterical. *See* PLAINTIFF's Opening Brief, at pp. 28-29, *citing Wooddell v. IBEW Local 71, et al.*, 502 U.S. 93, 112 S.Ct. 494, 500, 116 L.Ed.2d 419 (1991).

B. UNION AND FUNDS ARGUMENTS CONSTITUTIONAL CLAIMS WERE CORRECTLY DISMISSED FOR NO STATE ACTION ARE WITHOUT MERIT

UNION and UNION FUNDS Defendants are wrong in arguing there is no "state action" to support PLAINTIFF's

Constitutional claims. The Supreme Court affirmed a district court and Fourth Circuit Court of Appeals' decisions that taking money exceeding agency fees violated non-members' Constitutional rights, the duty of fair representation and N.L.R.A. § 8(a)(3) . *Communications Workers of America v. Beck,* 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed. 2d 634 (1988).

> "The District Court concluded that the union's collection and disbursement of agency fees for purposes other than bargaining unit representation violated the associational and free speech rights of objecting non-members, and therefore enjoined their future collection. 468 F.Supp. 93 (Md. 1979)."
>
> * * * *
>
> "[T]he United States Court of Appeal for the Fourth Circuit agreed that respondents stated a valid claim for relief under the First Amendment, but, preferring to rest its judgment on a ground other than the Constitution, concluded that the collection of nonmembers fees for purposes unrelated to collective bargaining violated [NLRA] § 8(a)(3). 776 F.2d 1187 (1985)."
>
> * * * *
>
> On rehearing, the *en banc* court . . . again affirmed . . . 800 F. 2d 1280 (1986)."
>
> * * * *
>
> "Respondents sought relief on three separate federal claims: that the exaction of fees beyond those necessary to finance collective-bargaining activities violates § 8(a)(3); that such exactions violate the judicially created duty of fair representation; and that such exactions violate respondents' First Amendment rights. We thing it clear that the courts below properly exercised jurisdiction over the latter two claims . . . ."
>
> * * * *

> "[R]espondents contend that, by collecting and using agency fees for nonrepresentational purposes, the union has contravened the express terms of § 8(a)(3), which, respondents argue, provides a limited authorization for the collection of only those fees necessary to finance collective-bargaining activities. there can be no doubt, therefore, that the challenged fee-collecting activity is "subject to" § 8(a)(3). "

Id., 487 U.S., 740-42, 108 S.Ct., 2646-47.

The Supreme Court went on to further hold,

> "This jurisdiction to adjudicate fair-representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts, but at its negotiation activities as well . . . . Respon dents . . . claim that the union failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs . . . . Under these circumstances, the Court of Appeals had jurisdiction to decide the § 8(a)(3) question raised by respondents' duty of fair representation claims.

Beck, 487 U.S., 743-44, 108 S.Ct. 2647-48. *See also* n.1, holding, "The courts below, of course, possessed jurisdiction over respondents' constitutional challenges," and n.7, ruling that those monies

> "in question 'were actually 'special purpose funds' . . . not used for collective-bargaining purposes [there for 'a credit union or building fund'], and "are obviously not 'for the maintenance of the [union] as an organization, but are for a 'special purpose' and could be terminated

without affecting the continued existence of [the union] as the bargaining representative.")

487 U.S., at 744, 752-53, 108 S.Ct., at 2648, 2652-53, and,

> "It simply does not follow . . . that Congress left unions free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated to collective-bargaining activities. On the contrary, the complete lack of congressional concern for the rights of nonmembers in a debate surrounding a House 'bill of rights' is perfectly consistent with the view that Congress understood § 8(a)(3) to aford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities . . . "

487 U.S., at 759-60, 108 S.Ct., at 2655-56.[5]

Machinists v. Street controls UNION's "state action" question,

> "In *Street* we concluded that . . . "Congress did not intend "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose."

---

[5] Unlike unions that bargain with employers who fund LMRA § 302(c)(5)(A) trusts, *cf.*, *Amax infra*, IBEW-affiliated "units" bargain only for wage increases, which are finalized by "union members" only in closed meetings, they hold new closed meetings to assign parts of wage increases into unions' "funds."

Congress first enacted the National Labor Relations Act (Wagner Act) to give unions "rights" to charge all employees full "dues" (even if they did not join) to remedy class struggles in the first third of the last century between one-big-union "syndicalists" and "robber barons" (threating robber barons and workers alike), and the LMRA created today's business unions. LMRA and ERISA "cooperation" institutionalized union and management thieves' control over $billion$ of employees' monies, and self-appointed "trustees" have now become little more than parasites (please *see* the Addendum to PLAINTIFF'S opening brief).

"Five years prior to our decision in that case, we ruled . . . that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves "governmental action" and is therefore subject to constitutional limitations.

"Accordingly, in *Street* we interpreted § 2, Eleventh to avoid the serious constitutional question that would otherwise be raised by a construction permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable [and] [I]t is, of course, true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid [b]ut statutory construction may not be pressed 'to the point of disingenuous evasion." (Citations omitted.)

Beck, 487 U.S., at 751, 761-62, 108 S.Ct., at 2652, 2656-57, *citing Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d. 1141 (1961); and *Railway Employees v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L.Ed. 1132 (1956). *See also Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed. 2d 232 (1986) (since "agency fees" procedure, established by union for considering objections by non-members to deductions from their paychecks to defray collective bargaining costs, is itself an impingement on First Amendment right union has a duty to minimize that impingement, and facilitate "non-union" employee's ability to protect her rights).

UNION and UNION FUNDS "state action" arguments are unsupported when it refused to establish agency fees procedures and the Supreme Court merely litigated claims instead under N.L.R.A. § 8(a)(3), and similarly validated PLAINTIFF's duty of fair representation claims.

C. STATUTES OF LIMITATIONS AND ERISA PREEMPTION ARGUMENTS DON'T MITIGATE THE UNION AND UNION FUNDS' THEFTS OF WAGES

UNION Defendants persisted in frivolous statute of limitations arguments in the face of the Supreme Court's clarification of those examples where analogous state statutes are more appropriate. *Reed v. United Transp. Union.*, 488 U.S. 317, 109 S.Ct. 621, 102 L. Ed. 2d 90 (1989) (the narrow exception to general borrowing rules does not require adoption of § 10(b) six months limitations period and fails to take seriously the requirements that analogous state statutes of limitations are to be used unless they frustrate, or significantly interfere with federal policies), *citing Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (a suit protecting the exercise of First Amendment rights is governed by state general or residual personal injury statute of limitations).

UNION FUNDS argued PLAINTIFF can't get his wages back because ERISA preempts accountability (his Complaint alleged FUNDS "misled" him "willfully, fraudulently, deceitfully, maliciously and oppressively" to take his wages), but the FUNDS argued they are "accepting . . . contributions" (FUNDS Brief p.17), and argued L.M.R.A. § 302(c) exceptions from a "Paycheck Protection Law" are preempted and above the law as ERISA trusts. Only the pension plan and welfare plan are subject to the LMRA § 302(c)(5)(A) requirements established pursuant to ERISA § 4(a) (29 U.S.C.A. 1003) . *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 321, 331, n.1, 101 S.Ct. 2789, 2799, n.l (1981).

Given frauds UNION used to take PLAINTIFF's wages, *supra*, p. 9,—and a one-year limitations period on recovery before forfeiture—(*see* Mittelbrun letter, at Apx. 67) without notice of its "takings" or intent to cause forfeitures, in the face of this Court's rulings the applicable statute of

limitations is one for breach of contract (*Cf., Meade v. Pension Appeals and Review Committee*, 966 F.2d 190 (6th Cir. 1992)), the UNION FUNDS' euphemistic reference to takings from his wages—by aberrating the Paycheck Protection Law itself—as "accepting the negotiated employer fringe benefit contributions based on the hours Plaintiff-Appellant and other employees in the bargaining unit worked" cry out for "discovery" of facts related to the entire scope and relationship of all such takings to ostensible "benefits" especially since the Paycheck Protection Law, LMRA § 302 (29 U.S.C. § 186) is one that gives rise to a RICO cause of action.

IV. CONCLUSION

A *Prayer For Relief* requested Declaratory Relief refunding his money and affirming DEFENDANTS' "takings" were illegal, prohibiting DEFENDANTS from taking non-members' money, declaring that the UNION must not use Hiring Hall "job-acceptance forms" to trick and extort nonmembers to sign dues deduction authorizations (by implied threat of loss of job), ordering CBA parties to appoint a neutral party to administer the CBA Hiring Hall, and also asked this court to enjoin LOCAL 58 and its Funds from continuing conduct declared illegal and from collecting "dues" from non-members wages, and to require those DEFENDANTS to notify non-members of rights to be reimbursed.

Those are not unreasonable requests, and full discovery should be allowed to uncover the entire size and scope of fraud DEFENDANTS used to wrongfully extort and take movies from Local 58 non-members that were not directly related to collective bargaining activities, and which were meant to compromise even non-members overtime pay.

Dated: 7-03-2002

/s/ Lawrence Moore
LAWRENCE MOORE

CERTIFICATION OF COMPLIANCE WITH CIRCUIT RULE 32

The undersigned certifies that the text in this brief is double spaced, with single spacing for quotations more than two lines long, for headings, and footnotes. The brief uses. Courier monospaced typeface with ten characters per inch and is 12 pages.

Dated: 7-03-2002 /s/ Lawrence Moore
LAWRENCE MOORE

ADDENDUM
STATEMENT RE JOINT APPENDIX

UNION Defendants cross-designated 13 filings in district court but six were already designated, except for prohibited memoranda of law (see F.R.A.P. 30(a)(2), 6.Cir.R.30 (f)(1)(E)), four were related only to procedural matters in another court (panel on multidistrict litigation), and attempted to insert unnecessary material unrelated to the issues in district court or the briefs on appeal (please *see* F.R.A.P. 30(a)(1)(A), 6.Cir.R.30(a) and (m)), one was a "memorandum of law," one was mooted by the PLAINTIFF's agreement and one wasn't relevant because it was amended before service.

UNION FUNDS Defendants similarly cross-designated a prohibited memorandum of law. PLAINTIFF also notes that, "Parts of the record may be relied on . . . even though not included in the appendix," and that the "Court has it available and will consult the entire record whenever it becomes necessary" (F.R.A.P. 30(a)(2), 6.Cir.R.30(a)).

ADDENDUM EXHIBIT

Labor-Management Reporting and Disclosure Act (29 U.S.C.§ 401, 402 and 411) with its Findings, Purposes, and Policy related to the Labor Management Relations Act of 1947, union membership, and dues.

Labor-Management Reporting and Disclosure Act of 1959, As Amended

Public Law 86-257, September 14, 1959, 73 Stat. 519-546, as amended by: Public Law 89-216, September 29, 1965, 79 Stat. 888, Public Law 98-473, October 12, 1984, 98 Stat. 2031, 2133, 2134, Public Law 99-217, December 26, 1985, 99 Stat. 1728, Public Law 100-182, December 7, 1987, 101 Stat. 1266, 1269

[Text shows new or amended language in boldface type.]

AN ACT

To provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Labor-Management Reporting and Disclosure Act of 1959."

Declaration of Findings, Purposes, and Policy (29 U.S.C. 401)

Sec. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere

to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or, the prices of. such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

Definitions
(29 U.S.C. 402)

Sec. 3. For the purposes of titles I, II, III, IV, V (except section 505), and VI of this Act—

(a) "Commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(b) "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

(c) "Industry affecting commerce" means any, activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the, Labor Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended.

(d) "Person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representative;, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code,[6] or receivers.

(e) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as

---

[6] Section 320 of Public Law 95-598 (92 Stat. 2678, Nov. 6, 1978, substituted "cases under Title 11 of the United States Code" for "bankruptcy".

an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

(f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

(g) "Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(h) "Trusteeship" means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2) ; or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

(k) "Secret ballot" means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed.

(l) "Trust in which a labor organization is interested" means a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.

(n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

(o) "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

(p) "Secretary" means the Secretary of Labor.

(q) "Officer, agent, shop steward, or other representative", when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel.

(r) "District court of the United States" means a United States district court 73 and a United States court of any place subject to the jurisdiction of the United States.

TITLE I—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

Bill of Rights
(29 U.S.C. 411)

SEC. 101. (a)(1) EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) DUES, INITIATION FEES, AND ASSESSMENTS.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the

date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent. labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) PROTECTION OF THE RIGHT TO SUE.-No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any

judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal No. 02-1503

LAWRENCE MOORS,
Plaintiff/Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL 58, *et al.*,)
Defendant/Appellee.

DECLARATION OF SERVICE

Person Served: Patricia Fabrizio
Date Served: July 2, 2002

The undersigned declares under penalty of perjury that I am over the age of eighteen years and not a party to this action; that I served the above-named person with the following documents:

REPLY BRIEF OF THE APPELLANT

I delivered the documents in the following manner:

_____By personally handing a copy to the party or attorney.
_____By leaving a copy in the office of the party or attorney with a clerk or the person who apparently was in charge, or in a conspicuous place therein.
_____By leaving copies at the dwelling house or usual place of abode of the party or attorney with a person at least 18 years of age then residing therein.
__XX__By placing copies in a separate envelope, with postage fully prepaid, for each address named below, on July 3, 2002.

PATRICIA J. FABRIZIO
SACKS WALDMAN
1000 Farmer Street
Detroit, MI 48226
Ph. (313) 965-3464

JOHN G. ADAMS
MARTENS, ICE, GEARY, ETC.
17117 W. Nine Mile Rd., Ste 1400
Southfield, MI 48075-4520
Ph. (248) 559-2110

Executed on July 3, 2002 at Toledo, Ohio.

/s/ [Illegible]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT OF MICHIGAN
SOUTHERN DIVISION

Case Number: 01-72222

Honorable Victoria A. Roberts

LAWRENCE MOORE,
Plaintiff(s),

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 58, *et al.*,
Defendant(s).

JUDGMENT

In accordance with the Order entered on Mar. 18, 2002, IT IS ORDERED that Judgment is entered in favor of Defendants.

Dated at Detroit, Michigan on Mar. 18, 2002.

DAVID J. WEAVER
Clerk of the Court

By: /s/ Illegible]
Deputy Clerk

Approved:

/s/ Victoria A. Roberts
VICTORIA A ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NUMBER: 01-72222
HONORABLE VICTORIA ROBERTS

LAWRENCE MOORE,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 58, *et. al.*,

Defendants.

ORDER GRANTING DISMISSAL AND SUMMARY JUDGMENT I N FAVOR OF DEFENDANTS

I. *Introduction*

On June 13, 2001, Plaintiff filed his lawsuit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds ("the Funds).[1] The Funds and Mittelbrun

---

[1] According to Defendants, the proper legal names for the Funds are IBEW Local 58 Annuity Fund; Electrical Workers' Pension Trust Fund of Local Union # 58, I.B.E.W., Detroit, Michigan; Electrical Workers' Insurance Fund; Apprentice and Journeyman Training Trust of the Electrical Industry, Detroit, Michigan; Southeastern Michigan Electrical Industry Labor Management Cooperation Trust Fund; Supplemental Unemployment Benefit Plan of the Electrical Industry, Detroit, Michigan; Electrical Workers Joint Board of Trustees Vacation Fund.

The Funds further state that there is no legal entity known as the Electrical Workers' Joint Board of Trustees. Rather, that term is used to

filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment on October 29, 2001, and the Local 58 and Rajewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint en November 19, 2001. For the reasons that follow, the Court will grant the Motions.

II. *Background*

During the relevant time period, Plaintiff was a member of the International Brothers of Electrical Workers ("IBEW") Local No. 8 in Rossford, Ohio. (Local 58 Br. at Ex. A). Perhaps because of that membership, he was able to obtain "job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ('CBA') between Defendant LOCAL 58 and Detroit area electrical contractors." (Complaint at ¶ 3). Like Local 8, "LOCAL 58 . . . is affiliated with Intern'l B'hood of Elect, Wkres . . . ." (Complaint at ¶ 4).

Perhaps because of Local 58's affiliation with IBEW, Plaintiff was allowed to sign a Pension Reciprocity form that would allow contributions made to the benefit funds on Plaintiff's behalf to be sent to his Local 8 funds. (*See* Local 58 Br, at Ex. A). But, when Plaintiff worked under Local 58's jurisdiction in July 1998, he did not complete the reciprocity form. He did not realize this error until 2000. On July 14, 2000, Plaintiff wrote a letter to the business manager of Local 58 explaining that he had previously "forgotten to come back and fill out reciprocity forms," and asking that the contributions now be sent to the Local 8 funds. (*Id.*) That request

---

collectively describe the fringe benefit funds established by Local 58's collective bargaining agreement, the International Brotherhood of Electrical Workers, and the Southeastern Michigan Chapter of the National Electrical Contractors Association.

was denied by the Board of Trustees of the Electrical Workers' Pension Trust Fund. Thomas Mittelbrun III, the administrator of the fund, explained in a September 13, 2000 letter to Plaintiff that his "request was denied due to it being made outside the time limit of one year allowed by the Plan." (Local 58 Br. at B).

Two days later, on September 15, 2000, Plaintiff received a referral from Local 58 to performance work for Triangle Electric Company. At the bottom of the relevant referral card, there is a section that states in bold and relatively large type, "PAYROLL DEDUCTION AUTHORIZATION." Underneath, the card states:

> I authorize the above Employer to deduct from my paycheck, the Union Working Dues, as stated and required in the amount fixed in the By-Laws of the Local Union 58, IBEW, and remit same to said Local Union in accordance with the terms set forth in the Bargaining Agreement between the NECA Chapter Southeastern Michigan and Local Union 58, IBEW.

(Local 58 Br. at Ex. C). Plaintiff signed the referral card on the line directly below that paragraph. (*Id.*)

It appears likely that Plaintiff signed the referral card before he received the September 13 denial letter from Middleton because, in a letter dated September 15, 2000, he angrily attempted to rescind the payroll deduction authorization. (Local 58 Br. at Ex. D). That September 15 letter was sent to Jeff Radjewski, the Local 58's business manager. Plaintiff began the letter by accusing Radjewski of "illegally screw[ing]" him out of his job in July 1998, when he was laid off. (*Id.*) He continued the letter by stating that, in response to his request to have his 1998 pension "deductions"[2] sent to his

[2] As will explained, *infra.*, Radjewski maintained that there were no pension *deductions* from Plaintiff's paycheck. Rather, the employer had made pension *contributions* over and above Plaintiff's pay.

home funds, Radjewski "blew [him] off with an abusive, intrusive letter from your Pension Trust administrator who attached a pretentious suffix to his name . . . . " (*Id.*) Plaintiff stated to Radjewski;

> I have no idea why you are so chicken-hit in stealing my 80 Pension credit-hour deductions . . . , but whatever caused it is also causing my following reactions.
>
> I am hereby rescinding that 'dues check-off authorization' I signed when I accepted a job-offer from Triangle Electric Co. on 9/15/00. Please inform my employer immediately and please also send me names of all 'Sub-pay' Fund trustees and administrators and all documents describing the legal make-up and operation of that entity . . . .

(*Id.*)

What is important to note from the above letter is that Plaintiff did not indicate to Rajewski that he mistakenly or unknowingly signed the dues deduction authorization. He does not state that he was tricked. Rather, he stated that he wanted to rescind that authorization in response to the decision to deny his request to have his 1998 pension benefits transferred to his home fund.

A more friendly letter dated September 15, 2000 was sent from Plaintiff to Frank Demers of Local 58. (Local 58 Br, at Ex. E). He explained that his recent review of his records revealed that he had forgotten to fill out and return a reciprocity form for the 80 hours he worked under Local 58's jurisdiction in 1998. Plaintiff asked Demers for help. (*Id.*)

On December 12, 2000, Plaintiff wrote another letter to Radjewski complaining that Radjewski had never responded to his earlier letter and that the dues were still being deducted from his wages. Plaintiff asked Radjewski to refund all the dues that had been deducted. (Local 58 Br at Ex. F).

Radjewski responded on January 2, 2001, acknowledging that he had not responded to Plaintiff's earlier letter. He reasoned, "If you want a civil reply, write a civil letter." (Local 58 Br, at G). Radjewski further stated that Plaintiff would need to notify his employer if he wanted to cancel his payroll deduction authorization. He informed Plaintiff that Local 58 could not start or terminate a payroll deduction on its own. Moreover, Radjewski stated, since Plaintiff was a member of the IBEW, he was not entitled to a refund of all dues and benefit fund contributions. "On the contrary, you are required to meet all member obligations, includes those obligations imposed by Local 58's collective bargaining agreement with its employers under which you worked and got paid." (*Id*). In the interest of the entire IBEW membership, it was Radjewski's duty to uphold the obligations imposed by the Local 58 collective bargaining agreement "under which you worked and got paid." (*Id.*) Radjewski additionally explained, "Benefit contributions are not deductions from your wages. They are separate obligations, in addition to wages, that the employers must meet pursuant to the collective bargaining agreement." (*Id.*)

In response to Radewski's January 2 letter, Plaintiff for the first time accused the managers of the hiring hall of tricking him into signing the payroll deduction authorization. (Local 58 Br, at H). In his January 19, 2001 letter, Plaintiff stated that his membership with the IBEW was unrelated to the Local 58's request to take money from his wages and that he had no obligation to pay the dues, and accused Local 58 of having engaged in theft. (*Id.*) Plaintiff demanded that all deductions from his 1998 and 2000 wages be refunded to him. (*Id.*)

Radjewski wrote back to Plaintiff on March 5, 2001, and denied that Plaintiff had been tricked. (Local 58 Br, at 1). The referral card had the authorization on it in plain sight and Plaintiff signed it. Further, "[playing working dues is a

member's obligation and, as I understand it, you are still an IBEW member with Card No. D295652." And, the benefit contributions that were paid by the employer were owed pursuant to the collective bargaining agreement—the same collective bargaining agreement that entitled Plaintiff to wages from his employer. (*Id.*) Moreover, Radjewski explained:

> Our arrangement on these issues are the same as other locals around the country. You and all IBEW members receive the advantages of these arrangements. As I told you previously, I am required to uphold the IBEW Constitution and our collective bargaining agreement. These monies are not 'stolen by minority votes at Union meetings', as you claim.
>
> Even if there were to be a refund of benefit contributions, any such refund would go back to the employer who paid them, not you. The reason is that benefit contributions are not deductions or 'theft', as you call it, from your gross wages. The wages are entirely separate from the benefit contributions paid by employers.

(*Id.*)

Plaintiff's April 5, 2001 letter revealed that he was undeterred. He continued to seek the 80 credit-hours of pension contributions that he insisted were stolen from his paycheck. And, he continued to insist that he owed no dues to the Local 58 because he was not a member of that organization. The deduction of dues was, according to Plaintiff, taxation without representation because he had no voice or vote in Local 58. (Local 58 Br. at Ex. K).

This lawsuit followed. As described below, the Court finds that Plaintiff's allegations either fail to state a claim or are not supportable by the evidence.

III. *Analysis*

A. *Standards of Review*

Defendants' Motion is partially filed pursuant to Fed. R. Civ. P. 12(b)(6). When reviewing a Rule 12(b)(6) Motion, the trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir.1995). Because a Rule 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of the witnesses." *Miller*, 50 F.3d at 377. The court should deny a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Gazette*, 41 F.3d *at 1064; see also Miller*, 50 F.3d at 377; *Vemco, Inc. v. Camardella*, 23 F.3d 129,132 (6th Cir.1994). While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1 240 (6th Cir. 1993). Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240.

Defendants also rely upon Fed. R. Civ. P 56(c). Under Rule 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect

application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir. 1995). To meet this burden, the movant may rely on any of the evidentiary sources listed in Rule 56(c). *Cox*, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Street v. J. C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). Thus, a motion for summary judgment is a means by which to challenge the opposing party to "put up or shut up." *Cox*, 53 F.3d at 149; Street, 886 F.2d at 1478. The moving party does not, however, have to support its motion for summary judgment with evidence negating its opponent's claims. *Celotex Corp, v. Catrett*, 477 U.S. 317, 323 (1985).

Once the moving party has met its burden, the burden shifts to the nonmoving party to produce evidence of a genuine issue of material fact. Rule 56(e); *Cox*, 53 F.3d at 150. The nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of its complaint. *Copeland*, 57 F.3d at 479. The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the nonmoving party. *Snyder*, 57 F.3d at 488; *Tolton*, 48 F.3d at 941.

B. *Count I*

Plaintiff's first count alleges, against all Defendants, a violation of his First Amendment Rights of Free Speech and Association and a Fifth Amendment taking without due process. This Count includes a litany of allegations, including that the Local 58 refuses to allow non-members any voice or vote on the collective bargaining agreement; has no right to deduct dues from non-members under the CBA; and requires electricians who accept jobs at the hiring hall to sign a job acceptance form which includes a payroll deduction authorization in fine print. Plaintiff contends that he was not told that the payroll deduction authorization was on the job acceptance form, but that Local 58 nonetheless took three percent of his wages; that Plaintiff was given no vote on participating in the Funds, but that Defendants took monies from Plaintiff for nonexistent, unavailable benefits; that Defendants also took monies from Plaintiff by agreeing that he receive reduced rates of pay for overtime work; and that the Local 58 refused to honor Plaintiff's rescission of his dues deduction authorization. Further, Plaintiff alleged:

> 37. At least some of the monies deducted from the PLAINTIFF's wages by Defendants TRUST and FUNDS are expended for political or for lobbying activities not directly related to work conditions, or community services, union organizing, foreign affairs, publicity or public affairs, given to Political Action Committees, or to support political candidates, parties, causes, and TRUST Defendant NATIONAL ELECTRICAL BENEFIT FUND illegally funnelled millions of dollars to political parties and politicians, causing one Trustee to resign.
>
> 38. Defendant UNION similarly expended funds for political or for lobbying activities not directly related to work conditions and gave to community services, union organizing or foreign affairs and publicity

> or public affairs, and to Political Action Committees and to support political candidates, parties, anc causes.

(*First Amended Complaint* at 4-6).

Apparently, Plaintiff included the allegations set forth in paragraphs 37 and 38 in order to have his Complaint fall within *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). Plaintiff cited that case in correspondence to Rajewski and deems that the most relevant authority for this Court to review. Having reviewed *Beck*, the Court finds that *Beck* does not support Plaintiff's claim. To the contrary, it highlights congressional efforts to discourage what-Plaintiff is attempting to accomplish here, which is to reap the benefits that Local 58 has negotiated with employers but to escape contributing financially.

In *Beck,* the Court framed the issue before it as follows:

> Section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA), 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(3), permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees otherwise wish to become union members. Today we must decide whether this provision also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

Id. at 738.

The plaintiffs in *Beck* were employees of AT&T who chose not to become union members. They challenged the union's collection of "agency fees" from them to the extent that the fees were used for purposes other than collective bargaining, contract administration, or grievance adjustment, which the *Beck* Court denoted "collective-bargaining' or 'representational' activities." *Id*, at 739-740. The plaintiffs specifically challenged their fees being used for the "organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events . . . ." *Id.* at 740. They claimed that the use of their fees for such purposes violated their rights under § 8(a)(3) of the NLRA and the First Amendment. *Id.*

To determine whether the use of the plaintiffs' fees for the challenged activities violated § 8(a)(3), the Court reviewed the structure and purpose of § 8(a)(3). Its examination revealed that the drafters of that section had two aims in mind. One aim was to eliminate the barrier created by closed union shop agreements, i.e., agreements that required an employer to hire only persons who were already union members. *Id.* at 748. An equally significant goal was to prevent nonunion members from getting a free ride. *Id.*

> As Senator Taft, one of the authors of the 1947 legislation, explained, 'the argument . . . against abolishing the closed shop . . . is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself.' 93 Cong.Rec. 4887 (1947), Leg.Hist. 1422. Thus, the Taft-Hartley Act was 'intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able

> to accomplish by collective bargaining will refuse to pay their share of the cost." *NLRB v. General Motors Corp.*, 373 U.S., at 740-741, 83 S.Ct., at 1458 (quoting S.Rep., at 6, Leg.Hist. 412).

Id. at 748-749.

Thus, in enacting § (8)(a)(3), "Congress recognized the validity of unions' concerns about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their *fair share* of financial support to such union, and gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of employees for any other reason." *Id.* at 749, (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954)) (emphasis added in *Beck*).

The *Beck* Court concluded:

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has beer 'whittled down to its financial core.' *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 *(1963)*. The statutory question presented in this case, then, is whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

Id. at 745.

In this case, Plaintiff stands in much different shoes than the plaintiffs in *Beck*. Unlike the Beck plaintiffs, Plaintiff is an IBEW member. Plaintiff highlights the fact that he is not specifically a member of Local 58, but he also admits that Local 58 "is affiliated with Intern'l B'hood of Elect. Wkrs." (*Amended Complaint* at ¶ 4). Indeed, Plaintiff emphasizes that

he has a contractual relationship with Local 58, and sites the IBEW Constitution at Article XX, in support.

> Sec. 3. The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L. U. and the I.B.E.W., and between such member and all other members of the I.B.E.W.

Thus, unlike the *Beck* plaintiffs, Plaintiff is not being forced to pay dues by virtue of § 8(a)(3). Plaintiff elected to become a member of the IBEW. Accordingly, the limitation that § 8(a)(3) places on the use of nonmember dues is simply not implicated here.

Of equal significance, the *Beck* plaintiffs did not attempt to reap the benefits of the CBA but, at the same time, avoid making any financial contributions to the union. They objected only to the use of their dues for expenditures outside of the union's collective bargaining and representational activities. In contrast, Plaintiff here acknowledges that he "worked as an electrician *via* job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ('CBA') between Defendant Local 58 and Detroit area electrical contractors," and that he was "a 'third party beneficiary' to a CBA between UNION and employers which contains a job Referral Procedure and an 'out-of-work list." (*Amended Complaint* at ¶ 113 & 15). Despite reaping those benefits, Plaintiff insists that the Local 58 had "no right" to deduct dues from his wages or other nonmembers of the Local 58. (Amended Complaint at ¶ 19).

Plaintiff's position is directly contrary to the purpose of § 8(a)(3), as explained by the *Beck* Court. One of the twin aims of § 8(a)(3) was to prevent those who choose not to join a union from getting a free ride. Employees who enjoy the benefits of the collective bargaining agreement and other core activities of the union must pay their fair share. Since § 8(a)(3) requires even nonunion members to contribute to

the costs of the CBA, Plaintiff's protestation that he does not have to pay dues because he does not have a voice or vote in the CBA is unavailing. And, his desire to gain employment and earn wages as a beneficiary of the CBA, but to avoid the negotiated overtime arrangements cannot withstand scrutiny.

Plaintiff argues that his dues are used for political and other non-core union activities. That claim is unsubstantiated. Plaintiff's only evidence is a November 1992 *I.B.E.W. Local 58 Newsletter*, in which Local 58 opined that then presidential candidate Bill Clinton's track record was on track with that of the union's, and a October/November 2001 *IBEW Journal* in which it was reported that Local 58 contributed $21,500 of the $341,500 that the IBEW contributed toward an election in Oklahoma. (*Plaintiff's December 14, 2001 Affidavit* at Ex. A & B). These newsletters do not evidence that the dues Plaintiff paid went to anything other than collective bargain ing activities. The November 1992 newsletter did not report any financial contributions to political activity, and neither newsletter corresponded to the timing of Plaintiff's dues deductions.

Furthermore, Plaintiff's claims of constitutional violations are both factually and legally without merit. Although the Beck plaintiffs claim rested in part upon the First Instead, the Court found that it "need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." *Id.* at 761. This is important because "the conduct of private parties lies beyond the Constitution's scope in most instances . . . ." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991). So, *Beck* is really no support of Plaintiff's constitutional claim.

Plaintiff also cites *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In that case, the Court held that the employees' First Amendment rights were violated when they were required to contribute toward political causes that those employees opposed. "[T]he Constitution requires [ ] that [political] expenditures be financed from charges, dues, or

assessments paid, by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-236. But *Abood* has important distinctions from this case. First, the Abood case involved governmental employees, as the above quote indicates. Secondly, in *Abood*, the Court found the case to implicate the constitution because Michigan law sanctioned the use of nonunion members fees for purposes other than collective bargaining. *Id.* at 232. Hence, *Abood* involved both state actors and state action. Neither is present here.

Moreover, even though the *Abood* case involved state actions and state actors, the Court did not hold that the union was forbidden from participating in political activity. To the contrary, the Court stated, "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood* at 235. Rather, the Court held that those activities could not be funded with the dues of objecting employees. Thus, even if this case involved state action, Plaintiff's evidence that the Local 58 has been involved politically would have been insufficient to sustain his First Amendment claim. Plaintiff has not shown that his dues were used to fund political activities, much less any activities that he opposed.

The Court additionally notes factual allegations of Plaintiff's Count I that are unsustainable. Contrary to Plaintiff's claim otherwise, the dues deduction authorization was not submitted to Plaintiff in fine print. The phase "PAYROLL DEDUCTION AUTHORIZATION" is the most prominent writing on the referral card that Plaintiff signed. (Local 58 Br, at Ex. C). Of further significance is the fact that Plaintiff did not initially claim that he was seeking a refund of his dues or to rescind his authorization because he had been tricked into signing it. Rather, he specifically indicated that he wanted to

rescind his authorization because his reciprocity form for his 1998 benefits was not honored; he wanted to rescind his authorization out of retaliation.

Furthermore, Plaintiff alleges that an unknown amount of benefits was taken from him. To the extent that Plaintiff means that Defendants deducted benefit payments from his salary, that allegation is directly contrary to the explanation that Rajewski gave to him. Rajewski repeatedly explained that benefits contributions are made from employers over and above the employees' wages. Moreover, to the extent that Plaintiff means that Defendants refused to send his 1998 benefits to his home fund, the record is clear that Plaintiff forgot to sign the reciprocity form until 2000. Thus, the benefits were not "nonexistent" or "unavailable," as Plaintiff contends. (*Amended Complaint* at ¶ 22). The benefits would have been sent to Plaintiff's home fund if he had timely submitted the reciprocity form.

At any rate, even if Plaintiff were able to sustain his factual allegations, they cannot support his First Amendment or Fifth Amendment claims because of the lack of state action.

C. *Counts II through V*

Plaintiff's additional counts are: Count II, for fraud and deceit; Count III, for breach of contract; Count IV, for breach of duty of fair representation; and, Count V, for intentional infliction of emotional distress. The factual allegations described in Count I that have already been rejected form the basis of these latter counts, and Defendants are therefore entitled to summary judgment on Counts II through V.

Furthermore, the Court finds that the claims against the Funds in Counts II, III and V are preempted by ERISA, *see, Lion's Volunteer Blind Ind., Inc. v. Automated Group Admin., Inc.*, 195 F.3d 803, 807 (6th Cir. 1999), and that Plaintiff's allegations against the Funds do not state a claim under ERISA. Plaintiff has not shown that ERISA prohibits fringe

benefits funds from collecting contributions for employment arising out of a CBA from employers with which the union has negotiated the CBA.

Moreover, Plaintiff's breach of duty of fair representation claim against Local 58 and Rajewski is barred by the NLRA's six month limitation period, which began when Plaintiff knew or should have known of Local 58's alleged breach of its duty of fair representation. *Schoonover v. Consolidated Freight ways Corp. of Delaware*, 49 F.3d 219, 221 (6th Cir. 1995). Plaintiff alleges that, *inter alia*, Local 58 and Rajewski deducted union dues without Plaintiff's authorization and without legal authority. (*Amended Complaint* at 77). Plaintiff attempted to rescind his dues deduction authorization as early as September 15, 2000. Thus, Plaintiff knew about the alleged wrongful due deductions over six months before filing his June 13, 2001 Complaint. Further, Plaintiff's allegations of fraud and deceit, breach of contract and intentional infliction of emotional distress arise out of the same alleged wrongful conduct that underlies the breach of duty of fair representation claim, and are therefore also barred by the six month limitation period. *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733, 735 (6th Cir. 1985).

IV. *Conclusion*

For the foregoing reasons, THE COURT GRANTS The Funds and Mittelbrun filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment [document 9] and the Local 58 and Rajewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint [document 12],

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

Date: Mar. 18, 2002

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MICHIGAN

[Filed Oct. 9, 2001]

CASE NO. 01-72222

LAWRENCE MOORE,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 58; LOCAL 58 ANNUITY FUND; LOCAL 58 PENSION TRUST; LOCAL 58 HEALTH WELFARE TRUST; LOCAL 58 TRAINING TRUST; LABOR-MANAGEMENT COOP FUND; LOCAL 58 SUB PAY FUND; LOCAL 58 VACATION PAY FUND; JEFF RADJEWSKI; ELECTRICAL WORKERS JOINT BOARD OF TRUSTEES ; THOMAS MITTELBRUN; NATIONAL ELECTRICAL BENEFIT FUND; and NATIONAL ELECTRICAL ANNUITY FUND,

Defendants.

FIRST AMENDED COMPLAINT (VIOLATIONS OF FIRST AND FIFTH AMENDMENTS; BREACH OF CONTRACT; BREACH OF THE DUTY OF FAIR REPRESENTATION; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; AND FRAUD AND DECEIT)
DEMAND FOR JURY TRIAL

I. JURISDICTION

1. This action arises under the First and Fifth Amendments to the U.S. Constitution; Labor-Management Relations Act ("LMRA") § 5 301, 301 (a) (29 U.S.C. § 185); National

Labor Relations Act ("NLRA") § 8 (a) (3) (29 U.S.C. § 158); and the Employees Retirement Income Security Act (88 Stat. 829), 29 U.S.C. § 1001 *et seq* ("ERISA")

2. Jurisdiction is invoked pursuant to 28 U.S.C. § 5 1331, 1337, and 1343, 42 U.S.C. S 1983, and 29 U.S.C. 1132, and pendent jurisdiction is asserted over any state created causes of action.

II. PARTIES

3. Plaintiff LAWRENCE MOORE is an individual who is not now, and never has been, a member of Defendant LOCAL 58, but who worked as an electrician via job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ("CBA") between Defendant LOCAL 58 and Detroit area electrical contractors,

4. Defendant LOCAL 58 ("UNION") is affiliated with Intern'l B'hood of Elect. Wkrs. ("IBEW") and a labor organization within the meaning of applicable Federal legislation, administers the CBA job referral procedure for employers, and requires electricians to sign job offers that authorize deduction of union dues from their wages.

5. Defendant RADJEWSKI as UNION Business Manager is the chief executive officer of Defendant UNION and a UNION-appointed Trustee on Boards of Trustees of its TRUSTS and FUNDS.

6. Defendant MITTELBRUN is the administrator of the Defendant ELECTRICAL WORKERS' JOINT BOARD OF TRUSTEES which establishes Plan provisions and policies for at least some or all of the Defendants TRUSTS and FUNDS, and other Trustees are as yet unknown.

7. Defendants LOCAL 58 PENSION TRUST, LOCAL 58 CITY FUND, LOCAL 58 HEALTH & WELFARE TRUST, and NATIONAL ELECTRICAL BENEFIT FUND and

NATIONAL ELECTRICAL ANNUITY FUND are entitles governed by ERISA which all took monies from the PLAINTIFF's wages without his authorization.

8. Defendants LOCAL 58 TRAINING TRUST, LABOR MANAGEMENT CO-OP FUND, LOCAL 58 SUB-PAY FUND and LOCAL 58 VACATION PAY FUND are also entities, form unknown, which all took monies from the PLAINTIFF'S wages without his authorization.

9. At all times relevant hereto Defendant RADJEWSKI, while also sued in his individual capacities, was an agent, employee and/or Trustee of Defendants UNION, TRUSTS, and FUNDS acting within the course and scope of their agency, and employment with the complete knowledge, consent, direction and subsequent ratification of his principals or masters.

10. At all times relevant hereto Defendant MITTEL-BRUN, while also sued in his individual capacity, was an agent, and employee of Defendants ELECTRICAL WORK-ERS JOINT BOARD OF TRUSTEES, TRUSTS, and FUNDS, acting within the course and scope of their agency and their employment with the complete knowledge, consent, direction, and the subsequent ratification of his principals or masters.

11. At all such times, the above-mentioned parties, while also sued in their individual capacities, were agents, servants and employees of each other and of all the remaining Defendants, acting within the course and scope of their agency and employment and with the knowledge, consent, direction and subsequent ratification of their respective or collective principals or masters.

III. JURY TRIAL DEMAND

12. Plaintiff hereby requests and demands that this action be tried by a jury with respect to any and all of the issues.

IV. EXHAUSTION OF REMEDIES

13. PLAINTIFF has exhausted all available internal UNION or CBA administrative remedies, or even if such remedies have not been exhausted, pursuing said remedies would be futile due to hostility between PLAINTIFF and Defendants. Finally, the PLAINTIFF could not even obtain adequate relief through such remedies.

FIRST CAUSE OF ACTION
(MOORE v. ALL DEFENDANTS FOR VIOLATION OF FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION, AND OF THE FIFTH AMENDMENT'S "TAKING"—WITHOUT DUE PROCESS—CLAUSE)

14. Plaintiff incorporates by reference allegations stated in Paragraphs 1 through 13, inclusive, as if fully set forth herein.

15. PLAINTIFF obtains temporary electrical construction jobs as a "third party beneficiary" to a CBA between UNION and employers which contains a job Referral Procedure and an 'out-of-work list."

16. The "out-of-work list" must by law be administered "non discriminatorily" as to UNION membership, or non-membership.

17. UNION also administers that job Referral Procedure "out of-work list" in a Public Hiring Hall as employers' agent.

18. Defendant UNION refuses to allow non-member PLAINTIFF any "voice" or "vote" on that CBA.

19. Defendant UNION has no other contract with the employers, and UNION has no right under that CBA to deduct dues from the wages of him or other, similar non-members of the UNION.

20. Defendant UNION requires all electricians who accept job offers in the Hiring Hall to sign a job acceptance form, which also contains a "Dues Deduction Authorization" in fine print.

21. PLAINTIFF was not told a Dues Deduction Authorization was on the form, and the UNION took three percent of his gross wages.

22. UNION, TRUSTS and FUNDS took monies from PLAINTIFF, who was given no vote on participating in TRUSTS and FUNDS, in amounts as yet unknown for nonexistent, unavailable "benefits."

23. UNION, TRUSTS and FUNDS also took monies from PLAINTIFF by agreeing that he receive reduced rates of pay for overtime work.

24. Defendant UNION deducted three percent of the PLAINTIFF' s wages as UNION "dues" after the TRUSTS and FUNDS also took monies.

25. The full amounts of monies taken from PLAINTIFF'S wages by Defendants TRUSTS and FUNDS are not known at this time.

26. The UNION's Bylaws provide that Defendant RADJEWSKI shall administer the CBA job Referral. Procedure for Defendant UNION.

27. The "union dues" relationship between the Defendant UNION and its members is contained in the UNION's Bylaws and those Bylaws are a contract between the UNION and its members.

28. The UNION refuses to allow non-members like the PLAINTIFF to have any "voice" or "vote" on its Bylaws.

29. PLAINTIFF rescinded his Dues Deduction Authorization when Defendant LOCAL 58 PENSION TRUST informed the PLAINTIFF it had also deducted monies from his wages without his authorization.

30. Defendant UNION, through Defendant RADJEWSKI, refused to stop deducting Union dues from PLAINTIFF'S wages.

31. PLAINTIFF requested a refund of dues on grounds he was tricked into signing a "Dues Deduction Authorization" and did not authorize any deductions, and was not a UNION member.

32. Defendant RADJEWSKI wrote PLAINTIFF he was not entitled to a refund because the UNION dues were deducted from his wages by employers, despite the money being in the possession of the UNION.

33. PLAINTIFF repeated the refund request and also requested refunds of all monies taken by TRUSTS and FUNDS.

34. On April 5, 2001 PLAINTIFF wrote Defendant RA.DJEWSKI and requested as an agency fee payer that he refund UNION' s "dues" and send PLAINTIFF its legally-required rebate procedure, and an alsolegally-required independently audited copy of LOCAL 58's financial records necessary to identify political or other spending which is non-chargeable against the non-member PLAINTIFF.

35. On April 19, 2001 Defendant R.ADJEWSKI wrote PLAINTIFF and enclosed an ostensible March 5, 2001 letter where RADJEWSKI refused to refund any monies deducted from PLAINTIFF's wages on grounds the deductions were paid by employers, and on grounds other unions that are affiliated with International IBEW also steal such monies.

36. All of PLAINTIFF's wages were paid by employers.

37. At least some of the monies deducted from the PLAINTIFF' s wages by Defendants TRUSTS and FUNDS are expended for political or for lobbying activities not directly related to work conditions, or community services, union organizing, foreign affairs, publicity or public affairs, given to Political Action Committees, or to support political

candidates, parties, causes, and TRUST Defendant NATIONAL ELECTRICAL BENEFIT FUND illegally funnelled millions of dollars to political parties and politicians, causing one Trustee to resign.

38. Defendant UNION similarly expended funds for political or for lobbying activities not directly related to work conditions and gave to community services, union organizing or foreign affairs and publicity or public affairs, and to Political Action Committees and to support political candidates, parties, and causes.

39. TRUSTS and FUNDS Defendants had no right to take monies from wages of PLAINTIFF who had no voice or vote on deductions, and they violated his Constitutional First and Fifth Amendment rights.

40. UNION Defendants had no legal rights to refuse to refund monies taken from PLAINTIFF' s wages by tricking him to sign a Dues Deduction Authorization and refusing to establish rebate procedures for part of his wages not used for collective bargaining, and UNION also violated his Constitutional First and Fifth Amendment rights.

41. All Defendants refused to refund any monies the PLAINTIFF demanded they return, and refused to establish that the monies were fees necessarily or reasonably incurred.

42. Defendants violated constitutional and statutory rights of PLAINTIFF by taking monies from his wages without authorization.

43. Defendants violated constitutional and statutory rights of PLAINTIFF by expending monies taken from his wages for purposes unrelated to collective bargaining.

44. The wrongful deduction of monies from PLAINTIFF's wages by Defendants was taxation without representation.

45. PLAINTIFF has performed all the CBA terms, provisions and conditions on his part to be performed.

46. Defendants' actions purposely and capriciously interfered with PLAINTIFF's rights, and deprived PLAINTIFF of his property.

47. No "industrial peace," "free flow of commerce," or other national labor policies require, or permit Defendants UNION, TRUSTS and FUNDS to use CBA provisions to take the wages of non-members.

SECOND CAUSE OF ACTION
(MOORE v. ALL DEFENDANTS FOR FRAUD AND DECEIT)

48. Plaintiff incorporates by reference allegations stated in Paragraphs 1 through 47, inclusive, as if fully set forth herein.

49. Defendants UNION and RADJEWSKI used their position as the administrators of a CBA job referral procedure to fraudulently take PLAINTIFF'S wages by tricking him into signing a job referral which included a "Dues Deduction Authorization" and by taking the "dues."

50. Defendants UNION, RA.DJEWSKI, MITTELBRUN and TRUSTS and FUNDS also fraudulently and deceitfully took PLAINTIFF'S monies by referring to them as "benefit contributions" to TRUSTS and FUNDS.

51. PLAINTIFF never agreed to any such benefit contributions.

52. Defendants UNION, RADJEWSKI, MITTELBRUN and TRUSTS and FUNDS also fraudulently took PLAINTIFF's monies by deducting wages they deceitfully instead referred to as "benefit contributions" and reducing his overtime pay rate by the amounts of the contributions.

53. Defendants UNION and RADJEWSKI colluded with employers to deduct wages for 'dues,' and for the TRUSTS and FUNDS in return for secret reductions of the CBA overtime rates paid to Plaintiff.

54. Defendants misled PLAINTIFF by the misrepresentations and omissions, written and verbal, related to the true status of wages, and overtime rates, and UNION and RA.DJEWSKI' s true motive's for that collusion in the face of their duties as Plaintiff's CBA exclusive bargaining representative, and refused to disclose material facts, and violated the law for their own benefit and greed.

55. All Defendants willfully, fraudulently, maliciously, and oppressively took PLAINTIFF's wages by all of circumstances stated above, and deliberately misled PLAINTIFF by statements, actions and silence, while purporting to have those legal rights as Plaintiff's representatives or TRUSTS and FUNDS created under the CBA.

56. As a direct and proximate result of Defendant's actions, which were done knowingly; willfully and with malicious intent, the PLAINTIFF lost the use of his property, and is entitled to punitive damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(MOORE V. ALL DEFENDANTS FOR BREACH OF CONTRACT)

57. PLAINTIFF incorporates by reference allegations stated in Paragraphs 1 through 56, inclusive, as if fully set forth herein.

58. PLAINTIFF and Defendants TRUSTS and FUNDS are third party beneficiaries to the CBA between UNION and signatory employers.

59. Defendants used that CBA relationship to take monies from PLAINTIFF's wages for UNION's "dues," and for the TRUSTS and FUNDS, without his approval, thereby breaching the CBA contract.

60. Defendants colluded to deprive him of correct pay rates for overtime work, thereby also breaching the CBA contract.

61. Defendant UNION'S members also elect UNION Officials who appoint each other to negotiate and administer CBAs with employers and as the Trustees of UNION'S TRUSTS and FUNDS.

62. Non-members of the UNION, including PLAINTIFF, are never appointed by UNION to negotiate CBAs, or to be Trustees of UNION'S TRUSTS and FUNDS, and CBA, TRUSTS and FUNDS provisions are ratified at meetings where non-members have no "voice" or "vote."

63. PLAINTIFF is a member of the International Brotherhood of Electrical Workers ("IBEW"), a separate Union based in Washington, D.C., which is affiliated with Defendant UNION.

64. Defendant RADJEWSKI, other UNION Officials, and Trustees of the Defendants TRUSTS and FUNDS as yet unknown also belong to an affiliated but separate IBEW, and that IBEW's constitution forms a contract between PLAINTIFF, Defendant RADJEWSKI and UNION Trustees on the Defendant TRUSTS and FUNDS who took the PLAINTIFF'S wages.

65. The IBEW "constitution" prohibits Defendant RADJEWSKI and other UNION Officials, and UNION'S appointed Trustees on Defendants TRUSTS and FUNDS from wronging the PLAINTIFF by "economic harm."

66. Defendant RADJEWSKI and other IBEW members-Trustees on the TRUST and FUNDS wronged PLAINTIFF and caused him economic harm by knowingly taking his wages and taking his correct overtime pay.

67. PLAINTIFF never knowingly authorized monies to be taken from his wages by the UNION, TRUSTS and FUNDS Defendants.

68. Defendant R.ADJEWSKI also referred PLAINTIFF to Defendant MITTELBRUN for information about the TRUSTS and FUNDS and said that MITTELBRUN represents "the benefit funds themselves."

69. Defendant MITTELBRUN did not reply to PLAINTIFF.

70. PLAINTIFF has performed all the CBA terms, provisions and conditions on his part to be performed.

71. The actions of the UNION, TRUSTS and FUNDS Defendants all purposely and capriciously breached their contracts with PLAINTIFF.

FOURTH CAUSE OF ACTION
(MOORE V. DEFENDANTS UNION AND RADJEWSKI FOR BREACH OF THE DUTY OF FAIR REPRESENTATION)

72. PLAINTIFF incorporates by reference allegations stated in Paragraphs 1 through 71, inclusive, as if fully set forth herein.

73. Defendants have a duty to represent PLAINTIFF fairly in the negotiation and administration of the CBA with employers.

74. Labor Unions may collect agency fees from the non-member PLAINTIFF, but the UNION may not collect or disburse such fees for purposes other than collective bargaining, contract administration, and grievance adjustment.

75. The Defendants breached that duty by taking his wages for UNION "dues" and for the TRUSTS and FUNDS, by cheating him out of overtime pay, by not giving him a "voice" or "vote" and by refusing to establish a legally-

required rebate procedure, and also-legally required independently audited copy of LOCAL 58's financial records necessary to identify political or any other spending which is non chargeable against the non-member PLAINTIFF.

76. Defendants also breached that duty by negotiating a right to administer the employers' CBA "out-of-work list, " in the face of UNION's self-interest in favoring its members over non-members.

77. The UNION arbitrarily, discriminatorily, and in bad faith refused to establish any agency shop agreement, deducted UNION dues from PLAINTIFF' s wages without his authorization, and also refused to establish such "dues" were validly chargeable to non-members.

78. UNION may only collect and use dues from non-members for expenditures necessarily or reasonably incurred for the purpose of performing its duties as the exclusive bargaining representative of employees in dealing with employers on labor-management issues.

79. The UNION arbitrarily, discriminatorily, and in bad faith collected and used dues collected from PLAINTIFF for other purposes and thereby violated National Labor Relations Act § 8(a) (3).

FIFTH CAUSE OF ACTION
(MOORE V. ALL DEFENDANT'S FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

80. PLAINTIFF incorporates by reference allegations stated in Paragraphs 1 through 79, inclusive, as if fully set forth.

81. PLAINTIFF has a legally protected right to his peace of mind and enjoyment of his property.

82. The conduct of Defendants described above to interfere with PLAINTIFF's peace of mind, and enjoyment of his

property, was outrageous and extreme, given that they had no legal interest in or right to that property and knew they had no such interest or right.

83. Defendants knew that they had no right to interfere with PLAINTIFF' s property but nonetheless acted with the intent to cause emotional distress to PLAINTIFF, or with reckless disregard of the probability of causing such emotional distress.

84. Defendants had knowledge of PLAINTIFF's susceptibility to the emotional distress caused by their continuing interference with his right to enjoy his property, and they proceeded in the face of such knowledge with the intent to cause the emotional distress.

85. Defendants acted with the intent to inflict the injury or with the realization that their injury was substantially certain to result from their conduct or with reckless disregard of probability that their actions would cause emotional distress to Plaintiff, and in fact have even continued such activities to the present.

86. Defendants' conduct was not privileged, and their ongoing injuries to and reckless disregard of PLAINTIFF must cease.

87. PLAINTIFF was actually caused such emotional distress by the Defendants and Defendants' conduct was the actual and proximate cause of the emotional distress, and the PLAINTIFF is entitled to punitive damages in an amount to be determined at trial.

V. PRAYER FOR RELIEF

88. WHEREFORE, PLAINTIFF PRAYS FOR JUDGEMENT AGAINST THE DEFENDANTS, AND EACH OF THEM, AS FOLLOWS:

A. DECLARATORY RELIEF—A case, controversy and actual conflict related to Defendants' takings of non-

members' wages now exists between. PLAINTIFF and the Defendants. Declaratory relief is necessary to determine the legality of the conduct alleged, and the respective rights and liabilities of the parties, and to affirm the above-alleged conduct is entirely improper and illegal. PLAINTIFF asks that UNION, TRUSTS and FUNDS be ordered to refund all movies improperly taken from non-members' wages, including overtime pay;

A judicial declaration is also necessary to prohibit the UNION, TRUSTS and FUNDS from taking non-members' wages, by calling takings "contributions" to TRUSTS and FUNDS, without any explicit written authorization not extorted in the UNION-run Hiring Hall;

There is an actual conflict regarding the legality of the practices and the applicability of CBA provisions which permit such takings from workers wages without such written authorization, and of the rights, obligations and liabilities of the parties herein;

Additionally, Plaintiff requests a judicial declaration that Defendants UNION and RADJEWSKI may not continue to use Hiring Hall job acceptance forms to extort the signing of "Dues Deduction Authorizations" from workers' wages by implied threats of loss of those jobs, especially against non-members who have no "check and balance" vote in RADJEWSKI' s or Officers/Trustees' UNION elections;

PLAINTIFF therefore requests a judicial declaration that the CBA parties modify their CBA provisions to appoint a "neutral" third-party to administer the Referral Procedure out-of-work list;

PLAINTIFF also requests the Court to declare the UNION has already breached its duty of fair representation to non-member PLAINTIFF by the acts alleged in the Fourth Cause of Action and the PLAINTIFF may thus present all issues in the Fourth Cause of Action to the Jury as breaches of contract

pursuant to the Supreme Court's doctrine in *Hines v. Anchor Motor Freight*, 96 S.Ct. 1048 (1967).

B. INJUNCTIVE RELIEF—Plaintiff has no adequate remedy at law for these injuries occasioned by the ongoing conduct alleged herein. Plaintiff therefore asks the Court to enjoin UNION, TRUSTS and FUNDS Defendants from continuing illegal practices and engaging in all conduct declared unlawful by this Court;

Injunctive Relief is also necessary to prevent UNION from collecting any more "dues" from non-members until it establishes an agency fee payer procedure, a legally-required rebate procedure and a procedure which also gives non-members access to legally-required independently audited copies of LOCAL 58's financial records which are necessary to identify political, or any other spending which is non-chargeable against such non-members.

Injunctive relief is also necessary to prevent the TRUSTS and FUNDS Defendants and each of them, from further engaging in all takings of non-members' property declared unlawful by this Court;

Defendants must be required to notify all non-members of their right to be reimbursed for the years of ill-gotten "takings";

C. SPECIAL DAMAGES—As a result of the foregoing, Plaintiff has been deprived of monies taken from him as UNION dues, TRUSTS and FUNDS "benefits," and not paid him as overtime pay, and seeks special damages in the amounts to be determined according to proof, with interest thereon at the legal rate;

E. PUNITIVE DAMAGES—At all times relevant hereto, all the Defendants' actions were performed with malice, oppression, and reckless and wanton disregard for the rights of PLAINTIFF, who is entitled to punitive damages (under

applicable causes of action) in an amount sufficient to make an example of wrongdoing Defendants;

E. For such further relief as deemed just and proper.

Date: 10-08-2001 /s/ Lawrence Moore
LAWRENCE MOORE

VERIFICATION

I, Lawrence Moore, do hereby declare:

I am the Plaintiff in this action, am over the age of eighteen years, and I would truthfully and competently state the following if called upon to testify.

I have read the foregoing Complaint and know the contents thereof. I certify that the same is true of my own knowledge, except as to those matters which are alleged on my information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct to the best of my, knowledge and belief.

Date: 10-08-2001 /s/ Lawrence Moore
LAWRENCE MOORE